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In The

Supreme Court of the United States

October Term, 1997

OJAVAN INVESTORS, INC., PORT LEMORE CORPORATION, SUTTON PROPERTIES, INC., SEALUBBER, INC., PAKID HOLDINGS, INC., MALEK AGENCY LTD., QUELIMANE CO., MTG ALLIANCE CORP., WESTERN LAND BANK, HIGHLAND GROUP, INC., P.U. ENTERPRISES, and PETER D. BOGART,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION, THOMAS A. GWYN, LILY CERVANTES, GARY GIACOMINI, MADELYN GLICKFIELD, DAVID MALCOLM, LINDA MOULTON PATTERSON, BONNIE NEELY, DORRIL WRIGHT, PETER DOUGLAS, RALPH FAUST, JOHN BOWERS, NANCY CAVE, DIANA DOO, WILLIAM RICK, and JANE YOKOYAMA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California (California Supreme Court No. S045246, California Court Of Appeal, Second Appellate District Division 2, Civ. No. B089152)

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the imposition of daily "civil" fines and penalties totaling in excess of 15 million dollars against Petitioners for alleged violations of the California Coastal Act based on the acquisition, resale and/or attempted resale of property lots without any "development" of the property, without any apportionment of the punishment in relation to the nature of the harm, and without the benefit of a jury trial, violated the Fifth, Seventh, Eighth and Fourteenth Amendments to the Constitution?

PARTIES TO THE PROCEEDING

The following, and no others, are parties to the instant proceedings:

Petitioners OJAVAN INVESTORS, INC., PORT LEMORE CORPORATION, SUTTON PROPERTIES, INC., SEALUBBER, INC., PAKID HOLDING, INC., MALEK AGENCY LTD., QUELIMANE CO., MTG ALLIANCE CORP., WESTERN LAND BANK, HIGHLAND GROUP, INC., P.U. ENTERPRISES, and PETER D. BOGART, were the Cross-Defendants before the Superior Court of the State of California in and for the County of Los Angeles below, the Appellants before the court of appeal of the State of California below, and the Petitioners for Review to the Supreme Court of the State of California below. None of the corporate petitioners have any parent or subsidiary companies.

Respondent is the California Coastal Commission, who was the Respondent, Appellee and Cross-Complainant below. The California Coastal commission is a State of California administrative agency vested with quasi judicial powers and supported in part by federal grants pursuant to 16 U.S.C. §§ 1451, 1454 et seq.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully seeks certiorari to review the judgment below and opinion of the Court of Appeal of the State of California in the Second Appellate District, Petition for Review having been denied by the Supreme Court of the State of California.

I.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals for the State of California in the Second Appellate District, Docket No. 2d Civ. R. 103320, 54 Cal.App.4th 373, 62 Cal.Rptr.2d 803, was entered on April 17, 1997, and is reproduced herein at Petitioners' Appendix App. A. Petitions for rehearing were denied by the Court of Appeals on May 7, 1997 and May 15, 1997, and said Orders are reproduced herein at Petitioners' Appendix App. G and H.

The Petition for Review was denied by the Supreme Court of the State of California by Order entered July 9, 1997, Docket No. S045246, which Order is reproduced herein at Petitioners' Appendix App. I. Remittitur was entered on July 25, 1997, and the Notice of Remittitur is reproduced herein at Petitioners' Appendix App. J.

The Judgment and Permanent Injunction issued by the Superior Court of California on November 9, 1994, and October 7, 1994, respectively, are reproduced herein at Petitioner's Appendix App. B and E. The Order Granting Summary Adjudication of Cross-Defendants' Liability Under the Coastal Act, entered by the Los Angeles Superior Court on March 23, 1994, is reproduced herein at

Petitioners' Appendix App. C, and the Order Granting Motion for Issue and Monetary Sanctions, entered by the Superior Court of California on March 3, 1994, is reproduced herein at Petitioners' Appendix App. D. The Order granting Respondents' Motions in Limine to Preclude Jury Trial and to preclude Petitioners' evidence at trial are reproduced herein at Petitioners' Appendix App. F.

II.

JURISDICTIONAL STATEMENT

The final judgment denying review by the Supreme Court of California was entered on July 9, 1997. Because the highest court of the State of California has denied further review and the decisions below deprive Petitioners of fundamental federal constitutional rights as expressed and delineated by this Supreme Court, jurisdiction lies with this United States Supreme Court on Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257.

III.

STATUTES INVOLVED IN THIS CASE

This case involves the application to Petitioners of California Public Resources Code § 30000 *et seq.*, and particularly California Public Resources Code § 30820 *et seq.*, by the California Courts in violation of the Fifth,

Seventh, Eighth and Fourteenth Amendments to the Constitution. These constitutional and statutory provisions are reproduced herein at Petitioners' Appendix K.

IV.
STATEMENT OF THE CASE

Petitioners are an individual and numerous corporations who were charged with violating the California Coastal Act by purchasing 54 individual parcels of land in the Santa Monica Mountains, and reselling 19 of the parcels to third party purchasers. This purchase and resale allegedly violated the Coastal Act by constituting "development" under the terms of the statute.

Specifically, the Coastal Act violations charged against Petitioners under the pre-1992 amendments to the Act, consisting of the purchase and resale of parcels of land in violation of previously recorded deed restrictions, were deemed to constitute "performing or undertaking development" in violation of the Act because "any change in the density or intensity of the use of land . . . including lot splits" constitutes "development". *Public Resources Code* § 30106. Thus, because all of the land was supposed to have been recombined into just two parcels, each of the 54 purchases of land and each of the 19 sales of land were held to constitute a separate "development" in violation of the Coastal Act.[1]

[1] Petitioners vigorously challenge the application of this definition to the instant situation. Because physical development of the lots is permanently barred by the Coastal

Despite the fact that these transfers of property in violation of the Act occurred on just two days, however, and that after the issuance of the Commission's cease and desist order no further transfers, or "lot splits", took place, Petitioners were charged with "intentional and knowing" "continuous and ongoing" violation of the Act simply because they continued to maintain the status quo of holding title to the properties while they challenged the Commission's orders in court. To this day, the daily fines and penalties are accruing while Petitioners remain title holders to the subject properties.

The "change in density" was effectuated because the seller of the properties, Mr. Dan Bochner, had earlier entered into an agreement with the Coastal Commission to deed restrict the properties so as to restrict development *and* combine the individual parcels into two larger parcels, in exchange for another, unrelated individuals' receipt of building permits. This was effectuated as part of the Coastal Commission's "TDC" [Transfer Development Credits] program.[2]

Commissions' deed restrictions, there cannot ever be any actual "change in density or intensity" of the use of the land.

[2] The "Transfer Development Credits" ("TDC") program (also referred to as "TDRs", or "Transfer Development Rights") was recently soundly criticized by Justices Scalia, O'Conner and Thomas in a concurrign opinion to a decision holding that the extinguishment of building rights on petitioner's property constituted a ripe regulatory takings claim despite the fact that the property was allowed to be used in the Tahoe Regional Planning Commission's TDRs program. justices Scalia, O'Conner and Thomas stated:

> TDRs, of course, have nothing to do with the use or development of the land to which they are (by

In being so charged with violation of the California Coastal Act, a temporary cease and desist order was imposed against Petitioners in August of 1992. On July 14, 1992, Petitioners filed a lawsuit challenging both the temporary cease and desist order and the recorded

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> regulatory decree) "attached". The right to use and develop one's own land is quite distinct from the right to confer upon someone else and increased power to use and develop his land. The latter is valuable, to be sure, but it is a new right conferred upon the landowner in exchange for the taking, rather than a reduction of the taking.
>
> . . .
>
> Putting TDRs on the taking rather than the just-compensation side of the equation (as the Ninth Circuit did below) is a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our takings-clause jurisprudence. Whereas once there is a taking, the Constitution requires just (ie., full) compensation (citations omitted), . . . a regulatory taking does not occur so long as the land retains substantial (albeit not its full) value (citation omitted).
>
> . . .
>
> The cleverness of the scheme before us here is that it causes payment to come, not from the government but from third parties – whom the government reimburses for the outlay by granting them (as the TDRs promise) a variance from otherwise applicable land-use restrictions.

Suitum v. Tahoe Regional Planning Agency, 117 S.Ct. 1659, 1997 U.S. LEXIS 3233, *38-41, 137 L.Ed.2d 980 (1997).

Notices of Violation, and sought declarative and injunctive relief, as well as damages. [C.T. 1[3]]

On August 12, 1992, the Commission used its power under the then newly enacted *Public Resources Code* § 30810 to issue a permanent Cease and Desist Order, directing Petitioners to permanently cease and desist from selling any more of the lots. Petitioners have not violated that order and instead have merely retained title to the properties they purchased pending the outcome of this litigation.

On October 2, 1992, the Coastal Commission and all other defendants cross-complained against Petitioners for the aforedescribed "development" in violation of the Coastal Act,[4] seeking declaratory and injunctive relief in the form of rescission of the property transfers, along with five causes of action seeking a maximum of $470 million in "civil penalties, fines and exemplary damages". [CT 170]

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[3] References are to the appellate record, unless otherwise indicated. "C.T." designates the Clerk's Transcript on appeal, and "R.T." designates the Reporter's Transcript on appeal, which together constitute the entire record of the proceedings below. "App." designates the appendix attached hereto.

[4] Although the subject property transfers took place in 1991, Petitioners were charged under the provisions of the *Public Resources Code* § 30810, which became effective January 1, 1992, and was later amended by Stats. 1993. [See, App. 7k] The amended statutory provisions are similar to 14 *California Code of Regulations* 13172, which is what Petitioners were initially charged with in the temporary cease and desist order.

Since the express purpose of the California Coastal Act is to protect the California Coastal Zone[5] from ecological damage [App. p. 3k], it is significant that the Coastal Commission never alleged environmental harm in its complaint nor was able to establish any such harm throughout the litigation. Thus, the trial court judge acknowledged in her judgment that there was "very little or no physical damage to the properties", and the primary reason for the entire action was iterated as "damage to the integrity of the TDC program". [App. p. 36a, para. 2]

Since the Commission at all times retained the power to enforce its prohibition against physical development of the properties, however, and no such physical development was alleged to have occurred and in fact did not ever occur, it is difficult to imagine how the "integrity of the TDC program" (which is designed to prevent development in coastal areas) was harmed in the amount of 15 million dollars by the transfer of lots as separate parcels rather than as two parcels.

Petitioners' complaint challenging the deed restrictions and the temporary cease and desist order, as well as two other complaints and a Petition for Writ of Mandamus challenging the permanent cease and desist order

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[5] The "coastal zone" is defined generally as extending inland approximately 1,000 yards from the mean high tide line, but may in "significant areas" be extended "inland to the first major ridge line paralleling the sea or five miles inland, whichever is less." *Public Resources Code* § 30103. The subject property is on the outer edge of one of these "extended" areas.

and the Transfer Development Credits program, respectively, were dismissed by the lower courts on the grounds that the statute of limitations for such a challenge had long since run six months after the deed restrictions were initially imposed upon the original owners of the properties.

On appeal, the California Court of Appeals affirmed those dismissals in *Ojavan v. California Coastal Commission*, 26 Cal.App.4th 516, 32 Cal.Rptr.2d 103 (1994), leaving only the Coastal Commission's cross-complaint for litigation.

On June 4, 1993, respondents filed a "Motion for Summary Adjudication of Cross-Defendants' Liability Under the Coastal Act, along with a request for Judicial Notice of the Deed Restrictions. [C.T. 822-866; C.T. 919-1092, 1105-1209] After a discovery dispute between the parties which resulted in individual Appellant Bogart being declared the "alter ego" of all Appellant corporations and thus personally liable for all fines and penalties [App. p. 2d], the Commission's Motion for Summary Adjudication on the issue of Petitioners' liability under the Coastal Act was renewed by respondents and ultimately heard on March 23, 1994, when Judge David Workman struck virtually all of Petitioners' evidence and granted the motion on behalf of the Commission. [C.T. 2678-2680; App. p. 1c]

Once the court below decided the liability issue on the basis of summary adjudication, the matter was transferred to Judge Ruth Essegian for hearing on the issue of the proper relief and penalties. The Coastal Commission brought motions in limine to preclude a jury trial, and to

preclude the introduction of Petitioners' evidence, including evidence on each of the five equitable considerations which were to be analyzed. [C.T. 3872-3875] Both of these motions were granted on August 4, 1994 [C.T. 3867-3871]

Because Petitioners were prevented form presenting the bulk of their relevant evidence on the issue of the proper amount of civil fines, penalties, exemplary damages and other relief to be imposed, the "trial", commencing on August 11, 1994, in fact consisted of a 4-day bench hearing, at which there was a demonstrable lack of showing of harm to the government and of any reasonable proportionality between the minimal harm alleged and the penalties imposed.

After the August 11, 1994, trial, a permanent injunction was issued by Judge Essegian against Petitioners, with Appellant Bogart personally liable, on October 7, 1994. [C.T. 4214-4217] The mandatory injunction ordered the rescission of all of the sales to the third-party purchasers, including repayment in full; "full rescission of the transfers such that all 54 of the properties that are the subject of this lawsuit are recombined into 2 lots pursuant to the Thorne and Leanse permits"; and then immediate return of the recombined lots to Daniel Bochner. [C.T. 4217; App. p. 1e]

Above and beyond the mandatory injunction, Judge Essegian then imposed $365,000.00 in fines against Peter Bogart personally for the statutory violation, plus $9,457,800.00 in fines, also against Appellant Bogart personally (for total fines and penalties of $9,822,800), at a rate of $7,300 per day for continuing "knowing and intentional" daily violations accruing since the date of service

of the temporary cease and desist order through the present. [C.T. 4282-4285] At the time of the instant Petition for Certiorari, these fines now exceed 15 million dollars.

After the judge's decision, Petitioners' then-counsel moved for a new trial on November 7, 1994 [C.T. 4259], and that request was denied via minute order dated December 2, 1994. [C.T. 4364] The final Judgment was entered on November 9, 1996 [App. p. 1b], which incorporated the March 24, 1994 decision by Judge Workman on the issue of liability [App. p. 1c], the Permanent Injunction issued on October 7, 1994 [App. p. 1e], as well as the October 14, 1994 Statement of Decision setting forth the amount of fines and penalties. [C.T. 4282-4301]

To this day, no development, in the ordinary sense of the word, has occurred on any of the subject lots. Since the date of the first temporary cease and desist order was issued not a single property was transferred, not one spoonful of dirt was moved, and no actual environmental damage was ever caused in the coastal zone protected by the statute at issue. No structures have been erected, no hills graded or vegetation removed. No new roads have been built, or old ones blocked.

In short, the environmental character of the subject property has not been altered in any way by Petitioners. Yet the ongoing daily fines now amounting to a staggering 15 million dollars have been upheld with utter disregard for Petitioners' constitutional rights.

V.

REASONS FOR GRANTING THE WRIT

A. Summary of Argument

In a telling statement reflecting the attitude and approach of the entire opinion by the state court below, the California Court of Appeals writes, "[s]ince we conclude the fines were not criminal, we need not address the federal cases cited by Ojavan Investors." [*Court of Appeals Decision, p.33, fn. 24; App. 41a*] However, it is this Court's decisions which *define* whether or not civil fines are excessive, disproportionate, and/or criminal under the U.S. Constitution, therefore plainly the state court in rendering its judgments is not allowed to ignore this Supreme Court's decisions delineating constitutional law.

This Petition for Certiorari constitutes a multi-faceted constitutional challenge to a Judgment and Permanent Injunction issued by the Superior Court of the State of California and affirmed by the California Court of Appeals, which imposes fines and penalties presently exceeding 15 million dollars against Petitioners for de minimus violations of the California Coastal Act, and orders forfeiture of the real property purchased by Petitioners to the original seller.

As described hereinabove, the judgment against Petitioners arose as a result of a cross-complaint filed by the California Coastal Commission alleging violation of the California Coastal Act, *California Public Resources Code* § 30000 *et seq.*, for the purchase and resale of real property located in the County of Los Angeles, California.

Petitioners contend that the judgment against them is unconstitutional according to fundamental precedent of this Court which was outright ignored, in some instances, or simply rejected, in others, by the California courts. In sum, Petitioners contend that:

1. The fines, penalties and forfeiture imposed against Petitioners in this case are excessive in violation of the Eighth Amendment. [*See, Austin v. United States, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 441 (1993); Alexander v. United States, 509 U.S. 544, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993); Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 1994 U.S. LEXIS 4440, 128 L.Ed.2d 767 (1994) (J. O'Conner, dissenting on basis that the civil fines at issue in that case would be subject to challenge under Excessive Fines Clause [128 L.Ed.2d at 789]); United States v. Halper, 490 U.S. 446, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989); see also, United States v. Bajakajian, 84 F.3d 334 (9th Cir. 1996), cert. granted, 117 S.Ct. 1841, 137 L.Ed.2d 1045 (May 27, 1997)*];

2. The fines, penalties and forfeiture are so grossly disproportionate to the governmental harm alleged that they are punitive and criminal in nature, so that Petitioners should have received the constitutional safeguards afforded criminal defendants, such as a jury trial and proof beyond a reasonable doubt [*See, International Union, United Mine Workers of America v. Bagwell, 114 S.Ct. 2552, 1994 U.S. LEXIS 5086, 129 L.Ed.2d 642 (1994); United States v. Ward, 448 U.S. 242, 248-249, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980); United States v. Halper, 490 U.S. 446, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) (civil penalties require "rough remedial justice"); Harmelin v. Michigan, 501 U.S. 957, 115 L.Ed.2d 836, 111 S.Ct. 2680 (1991); Department of*

Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937, 1994 U.S. LEXIS 4440, 128 L.Ed.2d 767 (1994); Hicks v. Feiock, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed.746 (1886)]; and,

3. The Judgment should not have been imposed without a jury trial because this action, was at the very least, a mixed legal and equitable action [*See, Tull v. United States, 481 U.S. 412, 95 L.Ed.2d 365, 107 S.Ct. 1831 (1987); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987); Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1009 (1974)*].

B. The Constitutional Infirmities of The Decision Below

In affirming the Judgment of the Superior Court of California, Petition for Review denied by the California Supreme Court, the California Court of Appeals expressly ignored and/or rejected applicable federal constitutional law in every aspect of its decision, as discussed herein below.

1. The Fines and Penalties Imposed Against Petitioners Are Excessive In Violation Of The Eighth Amendment, And Are Furthermore So Disproportionate To The Harm Alleged As to Be Punitive Rather Than Civil, So That Petitioners Should Have Received The Basic Constitutional Protections, Both Procedural And Substantive, That Are To Be Afforded Criminal Defendants

First, it was error for the California courts to refuse to consider the decisions of this Supreme Court in making their determination as to whether or not the fines and penalties imposed by the trial court were in constitutional terms to be considered "civil" or "criminal", and whether or not the fines and penalties were so excessive as to be constitutionally infirm.

Secondly, the California court states outright that they did not consider Petitioners' arguments that the California Coastal Commission should have been required to show its losses in order to establish proportionality between the judgment and the harm alleged, and that certain procedural protections were denied [*Ct. of Appeals' Decision, p.20, fn. 15; App. 25a*], although these were fundamental arguments discussed extensively by Petitioners in their briefs below in explaining in what way the judgments were constitutionally infirm in both causation and result.[6]

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[6] In its decision, the Court of Appeals appears to find Petitioners singularly distasteful. *See, Court of Appeals' Decision pp. 4, 32; App. pp. 33, 61.* However, the "attitude" of the defendant does not and must not diminish his or her

As this Court has stated:

> A civil sanction may be considered punitive when it subjects the offender to a 'sanction overwhelmingly disproportionate to the damages he has caused . . . [and when] the civil penalty . . . bears no rational relation to the goal of compensating the government for its loss . . . '

United States v. Halper, 490 U.S. 446, 449, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), cited in *United States v. Hawley*, 93 F.3d 682 (10th Cir. 1996).

Besides stating that it did not consider the federal cases cited by Petitioners in determining whether the fines imposed were in fact civil or criminal in nature, the California court also ignored the fact that a *civil* penalty could constitute a forfeiture, and could also be excessive in violation of the Eighth Amendment [*See, Court of Appeals' Decision, App. 37a*]

The California court states that an unconstitutional "forfeiture" is only properly used in the criminal context [*Court of Appeals' Decision, App. 32-33a*], and that a civil fine, because of its civil character, cannot be challenged

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constitutional rights, and the proportionality required by federal law is in relation to the *harm to the government*, not to the individual's *attitude*. Furthermore, the auction brochure to which the California court repeatedly refers with distaste, and which it uses as a basis for finding Petitioners' lot transfer violations to be *egregious*, is speaking of the *development restrictions* (*ie.*, the restriction on *building* anything on the subject properties), *Not* the then unknown fact that the lots were not supposed to be held as separate parcels. Petitioners have never denied knowledge of the development restrictions, only knowledge of the recombination order.

under the constitutional provisions prohibiting excessive fines. [*Court of Appeals' Decision, App. 40a, para.* 2] However, this Court has stated:

> The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, 'as punishment for some offense'. [citations omitted] 'The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law'.

Austin v. United States, 113 S.Ct. 2801, 2805, 509 U.S. 602, 610, 125 L.Ed.2d 488, 497 (1993).

Similarly, this Court has written that, "[a] civil forfeiture may violate the Eighth Amendment's proscription against excessive fines", and Justice O'Conner, in dissenting from the majority opinion holding the civil fine at issue to be in the nature of a criminal sanction, stated that such a ruling was unnecessary in light of the availability of the Excessive Fines Clause. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 797, 114 S.Ct. 1937, 1994 U.S. LEXIS 4440, *54, 128 L.Ed.2d 767, 789 (1994).

Petitioners' argument that the 15 million dollars in fines imposed against them in this case are effectively criminal rather than civil, and are excessive in violation of the Eighth Amendment, is surely not to be taken as lightly as did the California courts:

> The distinction between a civil penalty and a criminal penalty is of some constitutional import.
>
> . . .

> Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. [citation omitted] Second, *where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.* [citations omitted]

United States v. Ward, 448 U.S. 242, 248-249, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980) (emphasis added) (denying injunctive relief and holding that a $500 civil penalty imposed upon a company for spilling oil into a creek was not sufficiently punitive to negate the express remedial purpose of the statute and to trigger the need for protections against compulsory self incrimination).

Recently, this Court expanded upon the reasoning of *Halper, supra*, and held that a *civil tax* in the amount of eight times the value of the seized property (marijuana plants) was effectively a criminal penalty because it was not rationally related to the damages the government suffered and was therefore punitive in character – despite its legislative label of being "civil". *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 1994 U.S. LEXIS 4440, 128 L.Ed.2d 767 (1994).

The *Kurth* majority stated:

> Criminal fines, civil penalties, civil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior. All of these sanctions are subject to constitutional

> constraints. A government may not impose criminal fines without first establishing guilt by proof beyond a reasonable doubt.

Department of Revenue of Montana v. Kurth Ranch, 1994 U.S. LEXIS 4440, at 21, 511 U.S. 767, 793, 128 L.Ed.2d 767, 787.

In the instant case, as in the *Kurth* case, the California Coastal Commission was not required to provide, and failed to provide, evidence as to its actual costs and damages which would justify 15 million dollars in fines plus forfeiture of the real property, much less to provide any rational basis for the enormous fines that were imposed and are *still* being imposed on a daily basis, when the fact remains that there has been no harm to the environment and no further purchases or resale of the land at issue since the 1992 cease and desist order.

The inescapable conclusion is that the judgment against Petitioners under the California Coastal Act are constitutionally excessive, and are furthermore punitive and criminal in character, requiring that the Petitioners be afforded such fundamental constitutional protections as proof of each element of the alleged offense beyond a reasonable doubt, trial by jury, freedom from self-incrimination, the right to confront witnesses, and the presumption of innocence.

2. Petitioners Should Have Been Allowed Trial By Jury Because The Fines And Penalties Imposed Are Serious In Nature And Are Not Merely Incidental To The Injunctive Relief

The issue of Petitioners' constitutional right to a jury trial in this mixed equitable and legal action was tersely rejected by the California court:

> Ojavan Investors contest the trial court's grant of the Commission's motion in limine precluding a jury trial on Coastal Act issues. However, there is no right to a jury trial in an action sounding in equity. [*C&K Engineering Contractors v. Amber Steel Co.*, 23 Cal.3d 1, 9 (1978)] An action for injunctive relief is an equitable action. Where, as here, the civil fines are tied to the injunction in that the same alleged misconduct is the basis for all the types of relief sought, the issues are equitable in nature. [*People v. Witzerman*, 29 Cal.App.3d 169, 176-177 (1972)]. Accordingly, Ojavan Investor's arguments regarding denial of a jury trial lack merit.

[*Ct. of Appeals Decision, App. p. 30a*]

In fact, this analysis is misplaced, as this Supreme Court has previously addressed the extremely important jury trial issue in the environmental statute enforcement context such as that of the instant action. This Court has held that:

> First, while a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties. [citation omitted]
>
> . . .
>
> [I]f a 'legal claim is joined with an equitable claim, the right to a jury trial on the legal claim including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought.' "

Tull v. United States, 481 U.S. 412, 424, 95 L.Ed.2d 365, 107 S.Ct. 1831, 1839 (1987), *citing*, *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974).

In the instant action, the Coastal Commission asserted six causes of action against Petitioners, one for injunctive relief in the form of rescission of the property transfers, and five for civil fines and penalties including exemplary damages. Thus, the gist of the relief sought should be considered monetary, not injunctive. In *Tull, supra*, this Court addressed this very issue in dealing with the *Clean Water Act*, the provisions of which are closely analogous to the Coastal Act provisions in the instant action.

In *Tull*, this Court held that the Seventh Amendment guaranteed the petitioner a right to a jury trial in an action seeking both injunctive relief and civil penalties under the *Clean Water Act*, which had been brought against a real estate developer who damaged the environment (unlike the instant Petitioners) by dumping fill onto protected wetlands.

As in the instant action, the government in *Tull* argued that the enforcement action was a public nuisance action in nature, and that therefore it was entirely an action in equity. This Court disagreed, however, pointing out that the text and legislative history of the *Clean Water Act* demonstrate that such suits are intended to punish culpable individuals, and thus yield a type of remedy that at common law could only be enforced in a court of law. *Tull v. United States*, 481 U.S. at 420-424 (1987). Like the *Clean Water Act*, the California Coastal Act has expressly punitive goals, as the degree of culpability, the

intent of the defendant, and the defendants' prior history of violations are all factors to be considered. *Public Resources Code* §§ 30820, 30821.6, and 30822. *[App. pp. 15k, et seq.]*

In *Tull*, this Court examined at length the question of "whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity." *Tull v. United States*, 107 S.Ct. at 1835 (1987). This Court explicitly rejected the government's argument that the action sounded in equity and that the civil fines were incidental to or intertwined with the injunctive relief:

> This argument has at least three flaws. First, while a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties. [citation omitted] Secondly, the Government was aware when it filed the suit that relief would be limited primarily to civil penalties, since petitioner had already sold most of the property at issue. . . . A potential penalty of $22 million can hardly be considered incidental to the modest equitable relief sought.
>
> . . .

Tull v. United States, 107 S.Ct. at 1839 (1987).

Although in the instant case the government was able to obtain the agreement of the third party purchasers to rescind their purchases to Petitioners, thereby allowing full extent of the equitable relief sought by the Commission, the Commission in its five causes of action for monetary penalties sought a potential penalty of $470 Million (the maximum amount of fines accruing on a per day, per violation basis, as of the date of filing the cross-

complaint). As in the *Tull* case, these fines and penalties are certainly not "incidental" to the equitable rescission sought in the first cause of action.

These civil penalties cannot under fundamental constitutional principles of the right to a jury trial together with its common law heritage be found to be "tied" to the equitable remedy of rescission and injunction, because much more is sought by the Commission than simply returning the subject property to the undivided status quo.

In fact, as in *Tull*, the fines and penalties mandated by the Coastal Act and applied to Petitioners are not intertwined with the provision providing for equitable relief, but rather are "separably authorized in a separate and distinct statutory provision". California Public Resources Code §§ 30803 and 30805 [App. p. 14k]; *see also*, 14 *California Code of Regulations* 13172-13173 [App. p. 13k]; *Tull v. United States*, 481 U.S. at 425 (1987); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. at 58, 108 S.Ct. at 382.

Therefore, Petitioners should have been entitled to a trial by jury, regardless of whether the fines, penalties and forfeiture imposed are criminal in nature or excessive under the Constitution.

VI.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully pray that this Court grant certiorari.

DATED: October 6, 1997

Respectfully submitted,

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APPENDIX A

B089152-PARPUB-OP-4/17/97

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

OJAVAN INVESTORS, INC., et al., Plaintiffs and Appellants, v. CALIFORNIA COASTAL COMMISSION, et al., Defendants and Respondents.	B089152 (Super. Ct. No. BC159661) (Filed Apr. 17, 1997)

APPEAL from orders and a judgment of the Superior Court of Los Angeles County, Ruth Essegian, Judge. Affirmed.

Fosbinder & Fosbinder, James H. Fosbinder, Rhonda M. Fosbinder and Babak Naficy for Plaintiffs, Petitioners, Cross-Defendants and Appellants.

Daniel E. Lungren, Attorney General of the State of California, Roderick E. Walston, Jan S. Stevens, G.R.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II, III and IV of the Discussion.

Overton and Daniel A. Olivas for Defendants, Respondents, Cross-Complainants and Respondents.

Plaintiffs Ojavan Investors, Inc., Port Lemore Corp., Sutton Properties, Inc., Sealubber, Inc., Pakid Holdings, Malck Agency Ltd., Quelimane Co., MTG Alliance Corp., Western Land Bank, Highland Group, Inc., P.U. Enterprise and Peter Bogart (at times collectively Ojavan Investors) appeal the trial court's judgment imposing civil fines and a permanent injunction against violations of deed restrictions entered into by prior landowners as a condition of the California Coastal Commission's grant of coastal development permits. The Commission required the deed restrictions to further the purposes of the California Coastal Act of 1976. (Pub. Resources Code, § 30000 et seq.)[1] Ojavan Investors also contest an order granting summary adjudication on the issue of Coastal Act liability raised in the Commission's cross-complaint, as well as evidentiary exclusionary orders, an order precluding a jury trial and an order imposing discovery sanctions and declaring Bogart the "alter ego" of the corporate plaintiffs.

FACTUAL AND PROCEDURAL BACKGROUND

On December 19, 1979, and May 10, 1990, the Commission issued permits to landowners David Leanse and Larry Thorne for the development of real estate in the Malibu area. The permits required the recombination of

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[1] Unless otherwise indicated, all references to sections are to the Public Resources Code.

77 lots into 2 lots through the recordation of deed restrictions entered into by Sophisticated Investments, Inc. and Dan Bochner, successors in interest to Leanse and Thorne. Although the development projects were not related to each other, the Commission found they created a risk of adverse cumulative effects on coastal resources and public access to the coast.

To mitigate the projects' environmental impacts, the Commission conditioned approval of the permits on the landowners' participation in the Commission's Transfer Development Credits (TDC) Program. Under the TDC Program, the Commission approved new development projects in the Malibu area on the condition landowners extinguish the development capacity of other real property.[2]

In four declarations of restrictions, the first executed by Sophisticated Investments on June 19, 1981, and others executed by Hochner on July 11, 1984, and April 3, 1990, the successor landowners stated their intent to recombine and unify the property, and make the declarations perpetual and enforceable.[3] The Los Angeles County Recorder's Office recorded the declarations on July 2, 1981, July 23, 1984, and June 7, 1990.

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[2] "The TDC Program has been recognized as a well-established mechanism by which the Commission . . . attempts to balance a private property owner's ability to obtain development permits with the state's interest in protecting natural resources from unbridled development. [Citation.]" (*Ojavan Investors, Inc. v. California Coastal Com.* (1994) 26 Cal.App.4th 516, 520, fn. 3.)

[3] In 1983 Sophisticated sold its interest in its recombined lot to Bochner.

All four declarations of restrictions stated the landowners agreed to six restrictions, including the following: "(1) All portions of the Subject Lands shall be recombined and unified, and shall henceforth be considered and treated as a single parcel of land for all purposes with respect to the lands . . . ; (2) The single parcel created herein shall not be divided or otherwise alienated from the combined and unified parcel; . . . (4) Any breach of this Declaration of Restrictions shall constitute an abrogation of this contractual agreement which flows from the terms of the Permit and shall therefore render the Declarants or their successors liable pursuant to the provisions of Chapter 9 of Division 20 of the Public Resources Code; (5) This Declaration of Restrictions shall constitute a covenant running with the land . . . ; and (6) This declaration of Restrictions . . . shall bind the Declarants and their successors, heirs, and assigns in perpetuity and shall benefit the People of the State of California."

Notwithstanding the recombination of the 77 lots into 2 lots, Los Angeles county continued to tax the lots individually.

On January 16, 1991, Commission Staff Counsel John Bowers wrote a letter in response to questions regarding the effect of a tax lien foreclosure sale on the restrictions recorded pursuant to the Commission's TDC Program. Bowers opined a court would likely hold a purchaser acquires an ownership interest in the entire recombined parcel as a whole.[4]

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[4] According to appellant's opening brief, the letter concerned Los Angeles County's announcement it would

In February 1991, without the Commission's knowledge or approval, Ojavan Investors bought 54 of the 77 deed-restricted lots from Bochner. According to Bogart, an officer of most of the corporate appellants, Bochner did not inform Bogart the lots were not supposed to be sold separately.[5]

Thereafter, in an auction brochure, appellants advertised the sale of some of the development-restricted lots. The brochure announced, "Unbelievably cheap, due to restrictions on development. Economists tell us the government in broke, and only development money can fill the bureaucrats' maws. They'll *have* to develop!"

Ojavan Investors sold 19 of the lots to third parties.

To prevent future sales in violation of the lots' deed restrictions, the Commission in April 1992 had the Los Angeles County Recorder's Office record Notices of Violation Actions.

In addition, the Commission in May and July 1992 ordered Bogart, Western Land Bank, Gerald [sic] Gregg,

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foreclose on Bochner's tax delinquent lots. However, this letter is silent on the subject, merely expressing the Commission's legal opinion of the effect of a tax lien foreclosure on the TDC restrictions. Having failed to cite any other portion of the record to support their factual statement, appellants violate California Rules of Court, rule 15. We exercise our discretion to disregard this briefing defect and deem the brief as if it were properly prepared. (Cal. Rules of Court, rule 18.)

[5] In support of this factual statement, appellant's brief cites an exhibit attached to appellants' motion to augment the record. Since we denied the motion as to this exhibit, it is improper to rely on this exhibit. (Cal. Rules of Court, rule 15, subd. (a).)

and Jerry Gregg and Associates to cease and desist from the sale, conveyance or transfer of any property interest unless there is compliance while with the declarations of restrictions.

On July 14, 1992, Ojavan Investors filed a complaint against the Commission challenging its May 1992 cease-and-desist order.

On September 30, 1992, the Commission cross-complained against Ojavan Investors. Also named as cross-defendants were Highland Group, Inc., P.U. Enterprises, Peter Bogart, Jearald [sic] Gregg, P. Gannin, Dan Bochner, and Jerry Gregg and Associates.

The Commission's cross-complaint asserted six causes of action. Pursuant to section 30803(a), the first cause of action sought injunctive relief, and the second sought declaratory relief. The third cause of action sought civil fines under former section 30820, in the amount of $10,000 for each violation of the coastal development permits. Under former section 30821, the fourth cause of action sought daily civil fines of up to $5,000 for each day in which the alleged violations continue. The fifth cause of action sought section 30822 exemplary damages for Ojavan Investors' alleged knowing and intentional violation of the Coastal Act. The last cause of action requested compensatory and exemplary damages for abuse of process. According to the sixth cause of action, the Ojavan Investors cross-defendants misused their complaint in part by alleging they were corporations when they were sham corporations.

On October 9, 1992, Ojavan Investors petitioned the superior court for writ of mandate seeking the vacating of

the Commission's cease and desist order. That same month, Ojavan Investors filed a first amended complaint. Later, the superior court dismissed both pleadings, reserving jurisdiction over the Commission's cross-complaint.

On November 2, 1992, Ojavan Investors answered the Commission's cross-complaint. The answer asserted 15 affirmative defenses.

The first affirmative defense was the cross-complaint failed to state facts sufficient to constitute a cause of action, and the ninth affirmative defense was failure to state facts supporting a punitive damages award. The second, third, fourth, sixth, seventh and eighth affirmative defenses respectively claimed waiver, estoppel, contributory negligence, failure to mitigate damages, laches and an unspecified statute of limitations. The fifth defense urged reduction of any damages awarded against Ojavan Investors in proportion to the amount of fault attributable to others. The tenth and twelfth through fifteenth affirmative defenses alleged respectively Ojavan Investors were not parties to the coastal development permits, there was a failure of consideration for the declarations of restrictions, the declarations are unenforceable against Ojavan Investors, the Commission lacks authority to restrict land sales within the coastal zone, and there was no properly noticed public hearing to notify landowners next to the lots affected by the declarations. The eleventh affirmative defense alleged no proximate cause attributable to Ojavan Investors for the Commission's purported damages.

By November 3, 1993, the superior court entered judgments stipulated between the Commission and all

the third-party purchasers whereby the purchasers agreed to an injunction undoing the transfer of the real property to them.

On December 17, 1993, the Commission moved for summary adjudication of the issue of Ojavan Investors' liability under the Coastal Act as pleaded in the cross-complaint's first through fifth causes of actions.

On February 1, 1994, the Commission moved for issue sanctions for discovery violations. This motion stemmed from Ojavan Investors' noncompliance with an order granting the Commission's motion to compel document production.

Pursuant to Code of Civil Procedure section 2023, subdivision (b), Judge Workman granted the discovery sanctions motion on March 3, 1994. The superior court ordered "the facts alleged in paragraph 10 of the cross-complaint are deemed to be established in accordance with the Coastal Commission's claim, to wit: Cross-Defendants are sham corporations, and they are the alter egos . . . for Cross-Defendant Peter B. Bogart. The Coastal Commission, therefore, is relieved from producing any further evidence in support of its alter ego claim, and Cross-Defendants are precluded from presenting any evidence in opposition to the Coastal Commission's alter ego claim."

On March 23, 1994, Judge Workman issued an order granting the Commission summary adjudication of Ojavan Investors' liability under the Coastal Act as pleaded in the cross-complaint's first through fifth causes of action. The order stated it addressed neither the

amount of penalties to be imposed nor any other appropriate relief to be ordered at a later date.

On July 26, 1994, the superior court entered into a stipulated judgment between the Commission and Bochner whereby Bochner agreed to a permanent injunction rescinding the sales to Ojavan Investors.

On August 4, 1994, Judge Workman issued an order granting the Commission's motion in limine to prohibit evidence or argument regarding 10 claims of Ojavan Investors. The first four claims are the Commission is guilty of laches, time-barred from enforcing the deed restrictions or the permits, estopped from enforcing the deed restrictions or the permits, and waived its right to enforce the permit and deed restrictions because it acquiesced in the tax sales of some of the restricted lots. The fifth and sixth claims are the deed restrictions and permits are invalid or unenforceable. The seventh claim is the permits or deed restrictions violate the Subdivision Map Act relating to merger, Government Code Section 66410 et seq. The eighth and ninth claims are Ojavan Investors had no actual or constructive notice of the deed restrictions, and unknowingly and in good faith transferred deed-restricted property. The last claim is the corporate cross-defendants are not sham and not cross-defendant Bogart's alter egos.

Also on August 4, 1994, Judge Workman issued an order granting the Commission's motion in limine to preclude a jury trial on Coastal Act issues.

On August 11, 1994, the cross-complaint was transferred to Judge Ruth Essegian for a court trial solely on remedies. That same day, Bogart and the corporate cross-

defendants' counsel orally moved for reconsideration of Judge Workman's grant of the Commission's three motions in limine, for Bogart to be represented by separate counsel, and to amend cross-defendants' answer to the Commission's cross-complaint. Judge Essegian denied all three oral motions.[6]

Following the trial, on October 7, 1994, Judge Essegian issued a permanent injunction. Noting the third-party purchasers and Bochner stipulated to an injunction undoing all transfers in violation of the deed restrictions, and referring to the prior grant of summary adjudication of the cross-complaint's first cause of action, Judge Essegian permanently enjoined cross-defendants from violating the terms of the Leanse and Thorne permits. Judge Essegian ordered Bogart within 20 days of October 7, 1994, to rescind the sales of the deed-restricted lots to the third-party purchasers, and to refund the purchasers. In addition, she credited $51,000, which Bogart paid to Bochner for the properties, against the Commission's judgment on its cross-complaint.

On October 14, 1994, Judge Essegian issued a tentative statement of decision finding 73 violations. Pursuant to former sections 30820 and 30821, the trial court imposed on Bogart $5,000 for each violation, totaling $365,000, and daily $100 civil fines for each of the 73 violations until compliance with the court's order, totaling $9,457,800 as of the date of the tentative statement of

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[6] After the trial court denied Ojavan Investors' motion to reconsider the three in limine orders, Ojavan Investors petitioned for a writ of mandate to vacate the three orders. We denied the petition.

decision.[7] The court denied the Commission's request for exemplary damages under section 30822 on the ground such damages were unnecessary to deter further violations in light of the fines imposed.

Ojavan Investors untimely objected to the tentative statement of decision.

Consistent with her tentative decision, Judge Essegian entered a judgment for the Commission on November 9, 1994.

DISCUSSION

Ojavan Investors raise 13 narrowly framed issues on appeal. In response, the Commission lists seven issues. We conclude these issues amount to five main issues. One, did the superior court err in finding Ojavan Investors liable under the Coastal Act for buying and selling individual lots in violation of the recorded deed restrictions entered into by Ojavan Investors' predecessors as a condition for the Commission granting the prior landowners' coastal development permits? Two, did Ojavan Investors abandon their challenge of the discovery sanctions? Three, did the trial court err in granting the Commission's motions in limine excluding particular evidence? Four, were Ojavan Investors entitled to a jury trial? Five, did the superior court abuse its discretion in imposing a permanent injunction and determining the amounts of the civil fines?

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[7] The parties stipulated to reliance on former sections 30820 and 30821.

In analyzing these issues, we take note of *Ojavan I, supra,* 26 Cal.App.4th 516, which upheld dismissals of related actions brought by Ojavan Investors. Since *Ojavan I* is a final decision on the merits and concerned the same permits, deed restrictions and issue of whether the Commission's cease-and-desist order is enforceable against Ojavan Investors, the res judicata doctrine prohibits relitigation of matters already determined in *Ojavan I.* The fact the appeals in *Ojavan I* stemmed from general demurrers did not render the res judicata doctrine inapplicable.[8] Unlike a judgment following the sustaining of a special demurrer, a judgment following the sustaining of a general demurrer may be on the merits. (*Goddard v. Security Title Ins. & Guar. Co.* (1939) 14 Cal.2d 47, 52.)

Contrary to Ojavan Investors' contention, whether the res judicata doctrine applies does not depend on whether the causes of action in the present action are identical to the causes of action in a prior action. Although the causes of action in a first lawsuit may differ from those in a second lawsuit. " ' . . . the prior determination of an issue in the first lawsuit becomes conclusive in the subsequent lawsuit between the same parties with respect to that issue and also with respect to every matter which might have been urged to sustain or defeat its determination. . . . ' " (*Frommhagen v. Bd. of Supervisors* (1987) 197 Cal.App.3d 1292, 1301, quoting *Safeco Insurance Co. v. Tholen* (1981) 117 Cal.App.3d 685, 697.)

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[8] A special demurrer attacks a pleading for uncertainty, while a general demurrer points out substantive pleading defects such as failure to state a cause of action or affirmative defenses (e.g., statute of limitations or waiver).

Given the crux of *Ojavan I* and the present appeal is the enforceability of the deed restrictions as to Ojavan Investors, the *Ojavan I* rulings are binding in the instant action.

One of these rulings was the Leanse and Thorne permits' failure to refer to any restrictions on the lots later purchased by Ojavan Investors "is of no consequence in view of the declarations of restrictions which were duly filed in the county recorder's office. It is well settled that the burdens of permits run with the land once the benefits have been accepted. [Citations.] Accordingly, the declarations of restrictions run with the land and bind appellants even though they were not parties to the deed restrictions." (*Id.* at p. 526.)

"Since appellants' predecessors in interest waived their right to challenge the permit's TDC condition because they specifically agreed to and complied with the condition and accepted the benefits afforded by the permits and such predecessors in interest could not transfer or assign to appellants any legal rights greater than they themselves possessed [citations], appellants obtained the property in question with the same limitations and restrictions which bound their predecessors in interest." (*Ojavan I, supra,* 26 Cal.App. 4th at p. 527.)

I. SUMMARY ADJUDICATION OR COASTAL ACT LIABILITY SUPPORTED BY RECORDED DEED RESTRICTIONS ENTERED FOR PREDECESSORS' DEVELOPMENT PERMITS

Ojavan Investors contend the superior court erred in granting summary adjudication of the issue of liability

under the Coastal Act with respect to the Commission's first through fifth causes of action in its cross-complaint.

The applicable standard of review of a grant of summary adjudication of issues is the de novo standard. Consequently, we review the superior court's ruling, not its rationale. (*Stratton v. First National Life Insurance Co.* (1989) 210 Cal.App.3d 1071, 1083.)

In independently reviewing a motion for summary adjudication of issues, we apply the same three-step analysis used by the superior court. "First, we identify the issues framed by the pleadings. . . . [¶] Secondly, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's favor. . . . [¶] When a . . . motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue." (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064-1065.)[9]

The cross-complaint alleged in part Ojavan Investors allowed the violation of the coastal development permit encumbrances, despite the Commission's cease-and-desist order against noncompliance with the declarations of restrictions. The first through fifth causes of action cite sections 30803(a), 30820, 30821 and 30822 as the statutory bases for the relief sought.[10] Section 30803(a) authorizes

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[9] Although *AARTS* concerns an appeal of summary judgment, the analysis is the same for an appeal of summary adjudication of an issue.

[10] The cross-complaint quotes sections 30820, 30821 and 30822 as worded when they took effect in 1976. The California

an action for declaratory and equitable relief to restrain any violation of the Coastal Act or a Commission order to stop activity inconsistent with a previously issued permit. At the time the cross-complaint was filed, sections 30820 and 30821 provided for civil fines in the amounts pleaded. Section 30822 authorizes exemplary damages for intentional and knowing violations of the Coastal Act.

Although not directed toward our first step of analysis, Ojavan Investors's first argument against the grant of summary adjudication concerns the cross-complaint's statutory allegations in support of the third and fourth causes of action.[11] According to Ojavan Investors, the superior court erroneously held Ojavan Investors liable ex post facto because violation of another's previously issued coastal development permit was not a Coastal Act violation when Ojavan Investors bought and resold individual lots subject to the declarations of restrictions. Ojavan Investors maintain the repealed sections 30820 and 30821 did not authorize fines for a coastal permit violation, thereby requiring reversal.

This argument misreads the unambiguous language of former sections 30820 and 30821. Former section 30820 stated, "Any person who violates any provision of this division shall be subject to a civil fine of not to exceed ten

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Legislature subsequently in 1992 repealed sections 30820 and 30821, and added a new section 30820 imposing higher maximum civil fines than the repealed provisions.

[11] On appeal, Ojavan Investors raise three arguments for reversal of the summary adjudication order. Since the first two arguments require review of the cross-complaint, we consider those arguments with respect to the first step of *AARTS* test.

thousand dollars ($10,000)." Although the statute did not specify coastal permit violations, the statute applies to such violations because the Commission may only grant coastal development permits in compliance with the Coastal Act (§§ 30600, subd. (a), 30607), the Coastal Act must be liberally construed to accomplish its purposes (§ 30009), and these purposes include permanently protecting the California coastal zone's natural and scenic resources (§§ 30001, 30001.5). Since the Commission granted the permits at issue here to further the Coastal Act's purposes, former section 30820's broad reach extended to appellants as the successors-in-interest in the real property subject to the permits.

For the same reasons, the absence of language regarding violations of coastal permits does not render former section 30821 inapplicable to Ojavan Investors. That statute provided, "In addition to any other penalties, any person who intentionally and knowingly performs any development in violation of this division shall be subject to a civil fine of not less than fifty dollars ($50) nor more than five thousand dollars ($5,000) per day for each day in which such violation occurs."

While the new section 30820 recombining many of the provisions of former sections 30820 and 30821 adds liability for activity "inconsistent with any coastal development permit previously issued by the Commission," this addition did not change the Coastal Act's continual requirement of a coastal development permit in compliance with the Coastal Act. Nor did the addition alter the Legislature's purposes in enacting the Coastal Act in 1976. Accordingly, appellants do not escape liability as a

result of the absence of the term "permit" in the former provisions.

Further, by pleading civil fines in the amounts no higher than authorized by former sections 30820 and 30821, the Commission could not violate the constitutional prohibition against an ex post facto law. Such a law "passed after the occurrence of a fact or Commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed." (Black's Law Dict. (6th ed. 1990) p. 580, col. 1.)

Like Ojavan Investors' first argument against the summary adjudication grant, the second argument requires analysis of the cross-complaint. The latter argument is Ojavan Investors cannot be liable under the Coastal Act as a matter of law because Ojavan Investors' mere holding title to and reselling the lots do not constitute "performing or undertaking development" for purposes of coastal development permit requirements.

As the Commission pleaded in its cross-complaint, the Coastal Act's definition of the phrase "development," as applied to coastal permit requirements, covers Ojavan Investors' separate transfer transactions. The definition encompasses "subdivision pursuant to the Subdivision Map Act . . . , and any other division of land, including lots splits. . . . " (§ 30106.)

Since Ojavan Investors' purchase and sale of individual lots resulted in splitting of the recombined lots, in violation of the declarations of restrictions required as a condition for the Commission's grant of the Leanse and Thorne permits, Ojavan Investors' activities clearly fell

within the definition of section 30106. Therefore, dividing of the recombined lots triggered Coastal Act liability.

Next, pursuant to the three-step *AARTS* test for analyzing the viability of a summary adjudication motion, we consider whether the Commission established facts which negate Ojavan Investors' denial of Coastal Act liability and justify a judgment for the Commission. Pursuant to Code of Civil Procedure section 437c, subdivision (b), the Commission's separate statement of undisputed facts offered factual allegations supported by references to evidence.

The Commission's factual allegations included the recorded declarations of restrictions' provisions recombining 77 former individual lots into 2 lots, prohibiting the splitting of the 2 recombined lots, specifying the restrictions constitute covenants running with the land, and subjecting successors to Coastal Act liability for any breach of the declarations of restrictions. The declarations' unambiguous language clearly substantiated these allegations.

Likewise, the grant deeds referred to in the Commission's separate statement evidenced Ojavan Investors' purchase of individual lots and sale of some of those lots to third parties.

Having established facts supporting summary adjudication for Coastal Act liability, the Commission met the second part of the three-part *AARTS* test. As a result, the burden of proof shifted to Ojavan Investors to demonstrate at least one triable issue of material fact. To meet this burden, Ojavan Investors had to cite, in a responding separate statement, to admissible evidence supporting

the dispute of each factual allegation made by the Commission. (Code Civ. Proc., § 437c, subds. (b) and (d).)

In opposing the Commission's summary adjudication motion, Ojavan Investors dispute the existence of the underlying Leanse and Thorne permits and the validity and enforceability of the deed restrictions as applied to Ojavan Investors. To support the dispute, Ojavan Investors' opposing separate statement refers to Government Code section 66499.11, paragraphs 2 through 8 of cross-defendant Bogart's declaration, four exhibits and Civil Code section 1468.

Reference to the statutes in the separate statement constitutes improper legal argument. In any event, the definition of the word "development" in section 30106 contemplates the provisions of the Subdivision Map Act (Gov. Code, § 66410 et seq.), including Government Code section 66499.11. Moreover, contrary to Ojavan Investors' separate statement of disputed facts, Government Code section 66499.11 does not state "reversion may *only* occur 'pursuant to provisions of this article.' " (Italics added.) Instead, the statute states, "Subdivided real property *may be* reverted to acreage pursuant to the provisions of this article." (Italics added.) Therefore, Government Code section 66499.11 does not limit how reversion may take place.

Even if there were a conflict between the Subdivision Map Act and the Coastal Act, statutory construction principles require a specific statute to prevail over a general statute. (Code Civ. Proc., § 18859; *Loken v. Centry 21-Award Properties* (1995) 36 Cal.App.4th 263, 272-273.) The Legislature enacted the Coastal Act to protect the coast

statewide, while it generally gave local government power to regulate local subdivisions throughout the state (Gov. Code, § 66411). However, local regulation of property within the particular area of the coastal zone gives way to the state's authority to preserve the coast's natural resources, otherwise the Coastal Act's purposes would be hindered and the Coastal Act would not specifically refer to the Subdivision Map Act.

Civil Code section 1468 concerns covenants running with the land.[12] In the responding separate statement,

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[12] Civil Code section 1468 provides: "Each covenant, made by a owner of land with the owner of other land or made by a grantor of land with the grantee of land conveyed, or made by the grantee of land conveyed with the grantor thereof, to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, runs with both the land owned by or granted to the covenantor and the land owned by or granted to the covenantee and shall, except as provided by Section 1466, or as specifically provided in the instrument creating such covenant, and notwithstanding the provisions of Section 1465, benefit or be binding upon each successive owner, during his ownership, of any portion of such land affected thereby and upon each person having any interest therein derived through any owner thereof where all of the following requirements are met: [¶](a) The land of the covenantor which is to be affected by such covenants, and the land of covenantee to be benefited, are particularly described in the instrument containing such covenants; [¶](b) Such successive owners of the land are in such instrument expressed to be bound thereby for the benefit of the land owned by, granted by, or granted to the covenantee; [¶](c) Each such act relates to the use, repair, maintenance or improvement of, or payment of taxes and assessments on, such land or some part thereof, or if the land owned by or granted to each consists of undivided interests in the same parcel or parcels, the suspension of the right of partition or sale in lieu of partition for

Ojavan Investors contended the Commission must prove the declarations of restrictions are enforceable against Ojavan Investors by establishing the requirements of Civil Code section 1468 were met. Following *Ojavan I*, we reject this contention. "[T]he declarations of restrictions run with the land and bind appellants even though they were not parties to the deed restrictions." (*Ojavan I, supra,* 26 Cal.App.4th at p. 526.)

Most importantly, Ojavan Investors' evidence in support of its opposition to the Commission's summary adjudication motion fails to create a triable issue of fact. Bogart's declaration filed in opposition to the motion states the corporate appellants purchased the lots from Bochner following a diligent investigation for liens or restrictions, and in the good-faith belief the grant deeds were lawful. Bogart also declared he believed Bochner did not restrict the use of the lots, and the Commission did not object to the purchases from Bochner.

Bogart's self-serving statements, however, do not refute the fact the deed restrictions were recorded in the

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a period which is reasonable in relation to the purpose of the covenant; [¶](d) The instrument containing such covenants is recorded in the office of the recorder of each county in which such land or some part thereof is situated. [¶] Where several persons are subject to the burden of any such covenant, it shall be apportioned among them pursuant to Section 1467, except that where only a portion of such land is so affected thereby, such apportionment shall be only among the several owners of such portion. This section shall apply to the mortgagee, trustee or beneficiary of a mortgage or deed of trust upon such land or any part thereof while but only while he, in such capacity, is in possession thereof."

Los Angeles County Recorder's Office. Because the restrictions were properly recorded prior to appellants' purchase of the lots, appellants (who are admittedly engaged in the land auction business and therefore are sophisticated in land transfer transactions) are deemed to have constructive notice of the deed restrictions. As for the Commission, it did not object to the transfers because it lacked knowledge of them until after they occurred.

The remaining evidence of four exhibits relied on by Ojavan Investors show the lots were treated individually for tax purposes. The first exhibit contains copies of certificates of redemption issued by the Los Angeles County Tax Collector, the second exhibit contains a copy of the county's announcement of a public auction sale of the tax delinquent property, the third exhibit contains a copy of the State Controller's authorization for the sale of the tax-defaulted property, and the fourth exhibit contains a copy of a tax deed of the property issued by the county tax collector. These documents are inadmissible as irrelevant (Evid. Code, § 350) because the county's tax treatment of the lots does not affect the Commission's recombination of the lots for Coastal Act purposes. Unlike the function of the Commission to regulate development to protect natural and public resources, the function of local county assessors is merely to raise revenue in the form of taxes. These functions are unrelated.

Lastly, Ojavan Investors argue the order granting summary adjudication should be reversed because of recently discovered evidence. This evidence, which was not offered in superior court, consisted of the following five items: (1) Bowers' January 16, 1991, letter; (2) a declaration of restrictions executed by Almar Associates,

Ltd. June 16, 1981, and recorded by the Los Angeles County Recorder's Office July 3, 1981; (3) a modification of the declaration executed April 1, 1993, and recorded by the county recorder's office January 11, 1994; (4) a declaration of restrictions executed by Morton Devor April 30, 1993, and recorded January 11, 1994; and (5) an excerpt from Bochner's April 20, 1994, deposition, where he testified no one from the Mountains Restoration Trust told him the declarations of restrictions barred the sale of his lots as individual lots and applied to purchasers of the lots.[13]

Citing *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, the Commission maintains Ojavan Investors may not raise the issue of the Bowers' letter on appeal because this issue was not asserted in opposition to the summary adjudication motion. Affirming a summary judgment, the appellate court in *North Coast* refused to consider a factual issue raised for the first time on appeal because of general "waiver" and "theory of the trial" principles and because statutory law requires a separate statement specify all material facts deemed to be disputed. (*Id.* at p. 28.) The court explained the "waiver" and "theory of the trial" principles are "rooted in the fundamental nature of our adversarial system" requiring parties to call the trial court's attention to issues they deem relevant in order to be fair to opponents and the trial court. (*Id.* at pp. 28-29.)

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[13] On May 10, 1996, appellants moved to augment the record with the five items. We granted the motion only as to the first item.

The separate statement requirement in Code of Civil Procedure section 437c serves three functions: giving opponents notice of the facts, allowing the trial court to focus on the facts germane to the issues, and aiding the trial court in discharging its statutory duties. (*Id.* at pp. 30, 31.)

Without citing any legal authority, Ojavan Investors argue the new evidence should be considered because the Commission did not turn over the evidence during discovery. Alternatively, Ojavan Investors request us to treat this portion of the appeal as a writ of error coram nobis, citing a case, *Carroll v. Alsop* (1983) 143 Cal.App.3d 656, deleted on the California Supreme Court's direction by an August 18, 1983, order. In light of the failure to provide proper legal support, we need not consider this argument. (*In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 278, citing *County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 591; *see* also 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 479, p. 469.)

Nor do Ojavan Investors cite to portions of the record supporting its vague discovery evasion argument. Instead, Ojavan Investors cite to portions of the record not concerning discovery, including Judge O'Brien's judgment dismissing Ojavan Investors' petition for writ of mandate following the sustaining of the Commission's demurrer, and exhibits apparently following a prior motion by the Commission for summary adjudication on Ojavan Investors' complaint. Failure to appropriately refer to the record in the opening brief violates California Rules of Court, rule 15, subdivision (a). We according exercise our discretion to strike the portion of Ojavan Investors' brief concerning the new evidence. (Cal. Rules of Court, rule 18.)

We additionally do not consider Ojavan Investors' new evidence not cited in the separate statement opposing the Commission's summary adjudication motion, in order to further judicial economy and fairness.

II. MERE SUMMARY OF PROCEDURAL HISTORY OF DISCOVERY SANCTIONS RESULTS IN ABANDONMENT OF ISSUE ON APPEAL

Although appellants' opening brief states appellants appeal Judge Workman's order imposing discovery sanctions, there is no legal argument anywhere in the 50-page opening brief. Instead, Ojavan Investors merely summarize the sanctions' procedural history.[14]

"In a challenge to a judgment, it is incumbent upon an appellant to present argument and authority on each point made. Arguments not presented will generally not receive consideration. [Citation.]" (*Lackner, supra,* 97 Cal.App.3d at p. 591.)

Accordingly, we conclude Ojavan Investors abandon the discovery sanctions issue on appeal.[15]

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[14] In their reply brief, appellants claim they do not abandon the discovery sanctions issue because they addressed this issue on pages 9 through 10 of their opening brief's procedural history section. However, page 10 is silent on the issue, summarizing instead the Commission's motion for summary adjudication and its in limine motions for evidence preclusion and a non-jury trial.

[15] We also do not consider appellants' cursory claims of denial of effective procedural protections, failure to require the Commission to show its losses, denial of confrontation of witnesses, and refusal to allow Bogart to have separate counsel.

III. TRIAL COURT DOES NOT ABUSE DISCRETION IN EXCLUDING EVIDENCE

Ojavan Investors appeal exclusion of evidence at trial of appellants' lack of knowledge of the deed restrictions, lack of intent to violate the Coastal Act, and the affirmative defenses of selective prosecution, estoppel, waiver and unclean hands.

The applicable standard of review is whether the trial court abused its discretion. Under this standard of review, the trial court's ruling is reversed only where it is shown there is a "clear case of abuse" *and* a "miscarriage of justice." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

Appellants contend Judge Workman committed reversible error in granting the Commission's motion in limine preventing Bogart from introducing evidence at trial showing he did not knowingly buy the lots in violation of the law. They claim the trial court "ignored the difference between constructive knowledge for the purpose of determining liability, and actual knowledge or scienter for the purpose of assessing the appropriate amount of fines." Ojavan Investors maintains subdivision (c)(5) of amended section 30820 expresses the Legislature's intent in differentiating between constructive and actual knowledge in determining the amount of civil liability.[16]

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[16] Appellants' reliance on amended section 30820 contradicts their position on the ex post facto law issue, whereby they argued application of amended section 30820 would be unconstitutional.

However, when the superior court previously granted the Commission summary adjudication on the issue of liability, the court had before it Bogart's declaration asserting good-faith conduct and denying knowledge of deed restrictions or violations of law resulting from the transfer of individual lots. The court's rejection of Bogart's assertions was proper, as "the law conclusively presumes that a party acquiring property has notice of the contents of a properly recorded document affecting such property. [Citations.]" (*Hochstein v. Romero* (1990) 219 Cal.App.3d 447, 452.)[17]

Since the superior court's prior adjudication of liability left the remedies issues as the only remaining issues to be tried, the exclusion of any evidence concerning liability was proper.

Appellants rely on *Gantner & Mattern Co. v. Hawkins* (1949) 89 Cal.App.2d 783 as support for remanding the instant case for admission of evidence regarding appellants' knowledge of the deed restrictions. In *Gantner*, the plaintiff sued its former salesman, Douglas Hawkins, for violating his employment contract by selling the goods of a competitor of Gantner. Hawkins successfully cross-complained for sales commissions attributable to goods sold by him before he resigned from his job with Gantner. On appeal, Gantner argued there was no evidence to support the trial court's finding Gantner knew Hawkins sold certain items of Gantner's competitor before Hawkins so informed Gantner. Affirming the judgment for Hawkins,

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[17] Ojavan Investors argue reliance on *Hochstein* is misplaced. This argument lacks merits, as the principle we quote is well established.

the appellate court stated "actual knowledge. . . . may be inferred from circumstantial evidence." (*Id.* at p. 786.)

How *Gantner* could apply to the present issues stretches the imagination. Unlike the present case, *Gantner* does not concern whether the trial court abused its discretion for granting a motion in limine to exclude evidence at trial. Therefore, Ojavan Investors' reliance on *Gantner* is misplaced.

With respect to the exclusion of evidence of Ojavan Investors's selective prosecution affirmative defense, Ojavan Investors request judicial notice of an unpublished appellate opinion on an unrelated case not naming any appellants as parties. According to appellants, Bogart testified against the Commission in the unrelated case. Ojavan Investors make the request for the purpose of showing Bogart annoyed the Commission to the extent the Commission selectively prosecuted appellants in the present action.

We deny the request for judicial notice for two reasons. First, unpublished opinions generally are not citable. (Cal. Rules of Court, rule 977.) Where an exception to the general rule applies, the party relying on the unpublished opinion must attach a copy of the opinion to the party's papers. In the present case, none of the exceptions enumerated in subdivision (b) of California Rules of Court, rule 977 apply.

Second, while we may take judicial notice of the *existence* of judicial opinions, we may not take judicial notice of the truth of factual findings made in another action. (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 130, fn. 7; *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749.)

Significantly, Ojavan Investors' answer to the Commission's cross-complaint does not assert the affirmative defense of selective prosecution. Since the pleadings form the bases for the issues to be tried (7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 2, p. 19), Ojavan Investors' failure to plead selective prosecution prohibits litigation of this issue.

Even if appellants had asserted the selective prosecution defense in their answer, this defense is only available in a criminal action, as exemplied [sic] by the criminal nature of all four cases cited by appellants. Our own independent research of California case law on the defense of selective or discriminatory prosecution resulted in a retrieval of 85 cases, including all three state cases cited by appellants, reaffirming this defense is criminal in nature. As a result, attorneys defending themselves against State Bar disciplinary actions were not entitled to raise selective prosecution as a defense. (*In re Harney* (1995) 3 Cal. State Bar Ct. Rptr. 266, 282; *In re Bach* (1991) 1 Cal. State Bar Ct. Raptor. 631, 645.)

Since the present action is civil, the defense of selective prosecution does not apply. Even if the defense were available, the fact the Commission had to file its cross-complaint, in response to the actions Ojavan Investors initiated against the Commission (Code Civ. Proc., § 426.30), negates the contention the Commission selectively prosecuted appellants.

With respect to the exclusion of evidence of the remaining affirmative defenses, we note Ojavan Investors argue judicial error "on the basis of all of the foregoing

arguments" in the opening brief. Such a sweeping argument fails to pinpoint why reversal is warranted.

IV. BENCH TRIAL IS PROPER FOR ENVIRONMENTAL ACTION TO ENFORCE COASTAL ACT

Ojavan Investors contests the trial court's grant of the Commission's motion in limine precluding a jury trial on Coastal Act issues.[18] However, there is no right to a jury trial in an action sounding in equity. (*C&K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 9.)

An action for injunctive relief is an equitable action. Where, as here, the civil fines are tied to the injunction in that the same alleged misconduct is the basis for all the types of relief sought, the issues are equitable in nature. (*People v. Witzerman* (1972) 29 Cal.App.3d 169, 176-177.)

Accordingly, Ojavan Investors' arguments regarding denial of a jury trial lack merit.

V. TRIAL COURT DOES NOT ABUSE DISCRETION IN PERMANENTLY ENJOINING VIOLATIONS OF DEED RESTRICTIONS AND IMPOSING CIVIL FINES.

Ojavan Investors challenge both the permanent injunction and the civil fines. We first analyze the permanent injunction and then the civil fines.

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[18] In doing so, Ojavan Investors cite *Morton v. Larson*, an opinion formerly at (1996) 47 Cal.App.4th 874, but depublished as a result of the California Supreme Court's grant of a petition for review on October 16, 1996. (Cal. Rules of Court, rule 976, subd. (d).)

A. The Permanent Injunction Ordering Rescission of All Sales Resulting in Lot Splitting Does Not Amount to an Unconstitutional Forfeiture

Where, as here, the trial court's determination of injunctive relief does not result from a pure issue of law or statutory instruction, the abuse-of-discretion standard of review applies. (*East Bay Municipal Utility Dist. v. Dept. of Forestry and Fire Protection* (1996) 43 Cal.App.4th 1113, 1125.)

Ojavan Investors contest the portion of the permanent injunction ordering Bogart to rescind the sale of the deed-restricted lots to the third-party purchasers. Appellants claim this order amounts to an unconstitutional forfeiture.

In determining whether the trial court abused its discretion in issuing the mandatory injunction, we examine the cross-complaint. A perusal of the first cause of action for equitable relief shows the Commission contemplated rescission of the transfers in violation of the declarations of restrictions, as the Commission pleaded it was entitled to a permanent injunction "mandating Cross-Defendants to undo the violations of the [coastal development permits] and related encumbrances. . . . " The Commission points out appellants neither asserted an affirmative defense of unconstitutional forfeiture in their answer, nor raised this issue in their opposition to the Commission's summary adjudication motion concerning the first cause of action. As a result, the Commission maintains appellants are now precluded from attacking the injunction's rescission of the sales of the subject lots

to third parties. We disagree because the summary adjudication motion concerned merely liability and rescission is a remedy.

In support of their forfeiture argument, appellants cite six cases, (1) *Austin v. United States* (1993) 509 U.S. 602; (2) *Boyd v. United States* (1886) 116 U.S. 616; (3) *United States v. One 1985 Mercedes* (9th Cir. 1990) 917 F.2d 415; (4) *United States v. Jacobsen* (1984) 466 U.S. 109; (5) *Soldal v. Cook County* (1992) 506 U.S. 56; and (6) *International Union, United Mine Workers of America v. Bagwell* (1994) 512 U.S. 821, 129 L.Ed.2d 642.

Appellants also quote an excerpt of a prior edition of Black's Law Dictionary as support for their argument the injunctive relief constitutes a forfeiture. However, an updated edition of Black's Law Dictionary indicates forfeiture is a penal concept. The most recent edition defines the term "forfeiture" as "[l]oss of some right or property as a penalty for some illegal act. . . . [¶] forfeiture of property . . . is one of the penalties provided for under certain federal and state criminal statutes. . . . " (Black's Law Dict. (6th ed. 1990) p. 650, col. 1.)

The first three cases cited by Ojavan Investors confirm the typical criminal context in which the phrase "forfeiture" is used in the law. *Austin* concerned forfeiture of property used or intended to be used in drug-related crimes. (*Austin v. United States, supra,* 509 U.S. at pp. 604-605.) *Boyd* concerned the forfeiture of goods which the federal government charged were imported into the United States in violation of custom revenue laws. (*Boyd v. United States, supra,* 116 U.S. at p. 617.) *One 1985 Mercedes* concerned the forfeiture of a car as a result

of underlying charges of drug crimes. (*United States v. One 1985 Mercedes, supra,* 917 F.2d at p. 417.)

The fourth and fifth cases cited by Ojavan Investors address issues regarding seizure of property, an action which clearly did not occur in the instant case. *Jacobsen* concerned the removal of cocaine without a warrant by law enforcement officer summoned by a private freight carrier's employees. (*United States v. Jacobsen, supra,* 466 U.S. at p. 111.) *Soldal* concerned the removal of a trailer from a mobil home park during an unauthorized eviction of the trailer's residents conducted in front of police officers who were present at the request of the park's manager. (*Soldal v. Cook County, supra,* 506 U.S. at p. 58.)

Similarly, the sixth case cited by Ojavan Investors is factually distinguishable, as it analyzed the distinction between civil and criminal contempt. (*International Union, United Mine Workers of America v. Bagwell, supra,* 512 U.S. at ___; 129 L.Ed.2d at p. 649.)

While the permanent injunction required rescission of the lot transfers splitting the recombined lots, thereby resulting in the undoing of appellants' sales, this remedy was not intended to punish or criminalize the parties. Rather, the purpose of the injunction was to protect the public from violations of the Coastal Act. The superior court recognized this purpose in its permanent injunction by referring to the prior order granting summary adjudication. That prior order quoted the deed restrictions as follows: " . . . each restriction 'shall . . . benefit the People of the State of California.' "

Pursuant to section 30803, as amended in 1991, the Commission sought "equitable relief to restrain any

violation of this division or of a cease and desist order. . . . "[19] Section 30009 requires liberal interpretation of the Coastal Act provisions to accomplish its goals, including protection of the coastal zone's resources for the benefit of the environment and the public. (§§ 30001, 30001.5.)

The Commission established the TDC Program to accomplish the Coastal Act's goals. (*Ojavan, I, supra,* 26 Cal.App.4th at p. 520.) The program does so by conditioning the issuance of coastal development permits for the Malibu area "on the extinguishment of development rights as to other building sites in the coastal zone, either by offering to dedicate a scenic casement or by filing declarations of restrictions, thereby waiving development rights and unifying separate lots into one parcel." (*Ibid.*)

Had the trial court not rescinded Ojavan Investors' unlawful sales to the third parties, the court would have allowed Ojavan Investors to violate the deed restrictions. Such a result not only would have been contrary to the court's prior determination of Coastal Act liability for violating the deed restrictions' prohibition against splitting the recombined lots, made during the summary adjudication phase of the action, but it would also contravene the Coastal Act's purpose of limiting development in the coastal area.

It is well established the judiciary possesses broad discretion in deciding the type of equitable relief to fit a

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[19] As originally enacted, former section 30803 authorized an action for equitable relief "to restrain any violation of this division. . . . "

case's particular circumstances. (*People ex rel. Mosk v. National Research Co. of California* (1962) 201 Cal.App.2d 765, 775) This broad discretion includes a court's power to grant a mandatory injunction.[20] (*Allen v. Stowell* (1905) 145 Cal. 666, 669.)

Since the injunctive relief was intended to protect the public's interest in California's coastal areas, the remedy was civil in nature. Consequently, Ojavan Investors' forfeiture theory does not apply. In view of the record, the trial court properly exercised its discretion in ordering Bogart to rescind the sales to third parties.

B. The Fines Are Civil and Constitutional

Ojavan Investors contest the fines imposed pursuant to former sections 30820 and 30821 as criminal and unconstitutional.

Since the trial court previously found Ojavan Investors liable under the Coastal Act at the summary adjudication phase of the case, the statutes requires imposition of fines following the bench trial on the available remedies. Therefore, our analysis focuses on the amounts of the fines.

By setting forth a range for the amount of fines to be imposed, both statutes gave the trial court some discretion to determine the amount of fines. As a result, we disagree with appellants' position regarding the applicable standards of review. Rather than apply the substantial

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[20] A mandatory injunction compels action, in contrast to a prohibitory injunction, which prohibits action.

evidence and independent judgment standards of review, we apply the abuse-of-discretion standard of review.

According to Judge Essegian's tentative statement of decision, in determining the amount of fines to impose under former section 30820, the trial court considered the following five factors Ojavan Investors stipulated to at trial: "1. The nature, circumstance, extent, and gravity of the violation. 2. Whether the violation is susceptible to restoration or other remedial measures. 3. The sensitivity of the resource affected by the violation. 4. The cost to the state of bringing the action, and 5. With respect to the violator, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic profits, if any resulting from or expected to result as a consequence of the violation, and such other matters as justice may require." While the tentative statement of decision is not conclusive, it may be used as an aid to interpret the trial court's final decision embodied in the judgment. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 161; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 264, p. 271.)

The trial court rejected the Commission's position the violations should be rated at the highest level under each factor. Finding "very little or no physical damage to the properties" and "no evidence of any prior violations by defendant [*sic*]", the trial court determined "[t]hese factors work in mitigating for less than the maximum fine." However, the trial court found the remaining factors "egregious. They include the number of knowing and intentional illegal acts, sensitivity of the resource, cost to the state in bringing this action ($250,000), defendant's

[*sic*] culpability and profits made and expected to be made."

The tentative statement of decision shows the trial court exercised its discretion in setting the amounts of the fines, rather than mechanically adopt the Commission's position.[21]

Ojavan Investors argue the fines are excessive as a matter of law. In making this argument, Ojavan Investors first attempt to distinguish *State of California v. City and County of San Francisco* (1979) 94 Cal.App.3d 522 from the instant case. The appellate court in that case held a defendant had the burden of proving the defendant should not receive the maximum amount of civil penalties under California Water Code provisions implementing the Federal Water Pollution Control Act. (*Id.* at pp. 531-532.)

However, the present case does not deal with the imposition of the maximum amount of civil fines. Therefore, *State of California v. City and County of San Francisco, supra,* is inapposite.

Ojavan Investors next challenge the trial court's exclusion of evidence of Bogart's purported lack of knowledge of the deed restrictions prohibiting the splitting of the recombined lots. In excluding such evidence through its grant of the Commission's motion in limine, the trial court adhered to its prior adjudication of Coastal

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[21] The trial court's refusal to impose exemplary damages, sought by the Commission under former section 30822, also evidences its exercise of discretion.

Act liability. Notwithstanding the Commission's "consructive knowledge" arguments in support of its summary judgment motion, the judgment indicates the trial court had determined Bogart knowingly and intentionally violated the Coastal Act. The judgment stated in relevant part: "Based on prior orders of the Court . . . , Cross-Defendant Bogart is liable for both injunctive relief and civil fines for each of the seventy-three (73) separate, knowing, intentional and continuous violations of the Coastal Act of 1976 . . . committed by the Corporate Cross-Defendants. . . . " It was thus proper for the trial court to exclude any evidence not pertaining to the remedy stage.[22]

Appellants also maintain the trial court erred in holding them liable under the Coastal Act for 73 violations because only 2 coastal permits were alleged to be violated. However, the superior court in its summary adjudication order previously determined appellants bought 54 lots and then sold 19 lots in violation of the Coastal Act. Since the number of lot transfers totaled 73, the trial court did not err in calculating the number of violations. Moreover, the trial court considered the number of violations as a factor for not imposing the maximum penalty.

Next, Ojavan Investors argue the trial court violated the U.S. Constitution's Eighth Amendment, which prohibits excessive bail and fines, and cruel and unusual punishments. For legal support, appellants cite *Hale v.*

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[22] Further, a trial is generally limited to issues raised by the pleadings, and appellants' answer to the cross-complaint failed to raise lack of knowledge or a good-faith effort to comply with the law.

Morgan (1978) 22 Cal.3d 388. There, the California Supreme Court held Civil Code section 789.3 unconstitutional as violative of due process in particular circumstances. (*Hale v. Morgan, supra,* 22 Cal.3d at p. 392.) The statute at issue assessed a fixed penalty of $100 per day against a landlord who intentionally interrupts a tenant's utilities for the purpose of evicting the tenant. (*Id.* at p. 399.)

"In the exercise of its police power a Legislature does not violate due process so long as an enactment is procedurally fair and reasonably related to a proper legislative goal. The wisdom of the legislation is not at issue in analyzing its constitutionality, and neither the availability of less drastic remedial alternatives nor the legislative failure to solve all related ills at once will invalidate a statute. [Citations.] [¶] It is equally well accepted that a state may impose reasonable penalties as a means of securing obedience to statutes validly enacted under the police power." (*Hale v. Morgan, supra,* 22 Cal.3d at p. 398.)

In view of these principles and the lack of discretion Civil Code section 789.3 gave in fixing the penalty, the Supreme Court concluded Civil Code section 789.3 violated due process as applied to the facts of *Hale.*[23] The Supreme Court opined the fixed penalties for a broad range of culpable landlord activity constituted a "substantial difference" when compared to federal statutes

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[23] The California Supreme Court affirmed the fact-based analysis of whether Civil Code section 789.3 violates due process by concluding there was no such violation in *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 356.

requiring consideration of ameliorating factors for assessment of proper civil penalties. (*Hale v. Morgan, supra,* 22 Cal.3d at p. 399.)

Like the federal statutes differentiated in *Hale,* the civil fines set forth in former sections 30820 and 30821 were not fixed. Further, pursuant to the parties' stipulation, the trial court considered five factors in determining the amount of civil fines. As a result, *Hale* is distinguishable from the instant action.

"Within the civil penalty context, . . . a provision authorizing the imposition of a minimum civil penalty per violation, with each day constituting a separate violation, could not because of its civil character be subject to challenge under the constitutional provisions prohibiting excessive fines." (*People v. Djekich* (1991) 229 Cal.App.3d 1213, 1223, fn. 9.)

Ojavan Investors further contend there is no reasonable proportionality between the amount of the fines and the alleged harm to the government. In making this argument, appellants refer to the portion of the trial court's tentative statement of decision finding "very little or no physical damage to the properties involved."

As Ojavan Investors note, Nancy Cave, a Commission coastal program analyst who managed the Commission's enforcement program, testified at trial the Commission believed "a deterrent has to be established so that this kind of situation is prevented from occuring [sic] in the future."

Ojavan Investors argue Cave's testimony reveals the Commission's punitive goal. We disagree in light of the

public-interest goals of the TDC program, the need for uniform compliance with the program so as to further the Coastal Act's objectives to protect the coast, and appellants' blatant disregard of the deed restrictions.

Although appellants did not develop on the property, by acquiring individual lots for the purpose of selling them to third parties with the enticement of prospective development, appellants engaged in activities contrary to the Coastal Act's goal of limiting development. The auction brochure's very language conflicts with this goal, as well as contradicts Ojavan Investors' denial of intentional violation of the deed restrictions. This brochure explicitly advertised the lots' development restrictions, and mocked the government's laws by trying to lure prospective developers with the statement, "only development money can fill the bureaucrats' maws."

While the fines total over $9.5 million, the amount is large only because Ojavan Investors violated the Coastal Act 73 times and refused to remedy their violations. In view of the record, we conclude the fines were proportional to the number of violations and appellants' flagrant disregard of the TDC Program restrictions.

We hold the trial court did not abuse its discretion in setting the amount of civil fines under former sections 30820 and 30821.[24]

---

[24] Since we conclude the fines were not criminal, we need not address the federal cases cited by Ojavan Investors.

DISPOSITION

The judgment is affirmed. Appellants to pay respondents' costs.

CERTIFIED FOR PARTIAL PUBLICATION

JOHNSON, J.

We concur:

LILLIE, P.J.

WOODS, J.

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

OJAVAN INVESTORS, INC., et al., Plaintiffs, v. CALIFORNIA COASTAL COMMISSION, et al., Defendants. AND RELATED CROSS-ACTION.	No. BC059661 ASSIGNED TO JUDGE RUTH ESSEGIAN JUDGMENT (Filed Nov. 9, 1994)

The cross-action brought by the California Coastal Commission came on regularly for trial on August 11, 1994, in Department 313 of the Los Angeles County Superior Court located at 600 South Commonwealth Avenue, Los Angeles, California, the Honorable Ruth Essegian presiding and sitting without a jury. Daniel E. Lungren, Attorney General, appeared by Daniel A. Olivas and G. R. Overton, Deputy Attorneys General, on behalf of the Cross-Complainant California Coastal Commission ("Coastal Commission"). William Bloch, Esq. of the firm McMillan & Bloch, and Lois J. Stewart, Esq., appeared on behalf of Cross-Defendant Peter D. Bogart ("Cross-Defendant Bogart") and Cross-Defendants Ojavan Investors, Inc., Port Lemoore Corporation, Sutton Properties Inc., Sealubber, Inc., Pakid Holdings, Malek Agency Ltd., Quelimane Corp., MTG Alliance Corp., Highland Group, Inc., and P.U. Enterprises (collectively "Corporate Cross-

Defendants"). The trial addressed only the appropriate relief to be awarded the Coastal Commission on its cross-complaint because Cross-Defendants' complaint against the Coastal Commission previously had been dismissed with prejudice (Order re Dismissal and Sanctions, filed herein on May 14, 1993, signed by the Hon. Jerry K. Fields), and Cross-Defendants' Coastal Act liability had already been established (Order Granting Summary Adjudication of Cross-Defendants' Liability Under the Coastal Act of 1976, filed herein on March 23, 1994, signed by the Hon. David A. Workman).

Evidence, both oral and documentary, having been presented by all parties, the cause having been argued and submitted for decision, and the Court having made and filed a tentative statement of decision,

IT IS ORDERED, ADJUDGED, AND DECREED that

1. Based on prior orders of the Court determining liability and piercing the corporate veil, Cross-Defendant Bogart is liable for both injunctive relief and civil fines for each of the seventy-three (73) separate, knowing, intentional and continuous violations of the Coastal Act of 1976 (Pub. Res. Code §§ 30000 *et seq.*) committed by the Corporate Cross-Defendants. (*See* Order Granting Summary Adjudication of Cross-Defendants' Liability Under the Coastal Act of 1976, filed herein on March 23, 1994, and Order re Issue and Monetary Sanctions, filed herein on March 3, 1994, attached as Exhibits A and B, respectively, and incorporated in this judgment.) Accordingly, Cross-Defendant Bogart and Corporate Cross-Defendants are jointly and severally liable for the relief granted in this judgment.

2. Pursuant to Public Resources Code section 30820, the Court fines Cross-Defendants five thousand dollars ($5,000) for each of the seventy-three (73) violations for a total of three hundred sixty-five thousand dollars ($365,000).

3. Pursuant to Public Resources Code section 30821, the Court fines Cross-Defendants one hundred dollars ($100) per day for each of the seventy-three (73) violations, from the date of each illegal purchase and sale of the deed restricted lots, up to October 13, 1994, for a total of nine million, four hundred fifty-seven thousand, eight hundred dollars ($9,457,800). Cross-Defendants shall receive a credit against these fines for the amount they paid for purchasing the fifty-four (54) lots as provided in the permanent injunction issued herein on October 7, 1994. (*See* Permanent Injunction, filed October 7, 1994, at p. 4, lines 9-13, attached as Exhibit C and incorporated in this judgment.)

4. Pursuant to Public Resources Code section 30821, the Court fines Cross-Defendants one hundred dollars ($100) per day for each of the seventy-three (73) violations, from October 14, 1994, until the date of Cross-Defendants' compliance with the Court's permanent injunction issued October 7, 1994, for a total of seven thousand, three hundred dollars ($7,300) per day until such compliance.

5. The Court does not impose an additional civil fine on Cross-Defendants pursuant to Public Resources Code section 30822 because, taking into consideration the Court's Permanent Injunction and the civil fines already

imposed pursuant to sections 30820 and 30821, an additional civil fine is not necessary to deter further violations of the Coastal Act.

6. Pursuant to Public Resources Code section 30823, all civil fines should be made payable to "State of California, Violation Remediation Account, Coastal Conservancy Fund."

7. The Coastal Commission is awarded its costs as delineated in its Memorandum of Costs filed herein.

DATE: 11-9-94

/s/ Ruth Essegian
Judge of the Superior Court
RUTH ESSEGIAN

APPENDIX C

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Attorneys for Defendants and Cross-Complainants

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

OJAVAN INVESTORS, INC., et al., Plaintiffs, v. CALIFORNIA COASTAL COMMISSION, et al., Defendants.	No. BC059661 ASSIGNED TO JUDGE DAVID A. WORKMAN ORDER GRANTING SUMMARY ADJUDICATION OF CROSS-DEFENDANTS' LIABILITY UNDER THE COASTAL ACT OF 1976
AND RELATED CROSS-ACTION.	DATE: Feb. 25, 1994 TIME: 8:30 a.m. PLACE: Dept. 40 Trial Date: None Motion Cut-Off: None Discovery Cut-Off: None (Filed Mar. 23, 1994)

Cross-Complainant California Coastal Commission's motion for summary adjudication of Cross-Defendants' liability under the Coastal Act of 1976, Public Resources

Code sections 30000 *et seq.*, came on regularly for hearing on ~~February 25~~ March 25, 1994, at 8:30 a.m. in Department 40 of the above-captioned Court located at 111 North Hill Street, Los Angeles, California, the Honorable David A. Workman presiding. Daniel E. Lungren, Attorney General, appeared by G. R. Overton and Daniel A. Olivas, Deputy Attorneys General, on behalf of Cross-Complainants. The law firm of McMillan & Bloch appeared on behalf of Cross-Defendants. The motion was directed to Cross-Defendants Ojavan Investors, Inc., Port Lemore Corporation, Sutton Properties Inc., Sealubber, Inc., Pakid Holdings, Malek Agency Ltd., Quelimane Corp., MTG Alliance Corp., Highland Group, Inc., and P.U. Enterprises (collectively "Cross-Defendants").

After full consideration of the evidence and points and authorities submitted, and oral argument of counsel, it appears and the Court finds that Cross-Complainant Coastal Commission has shown by admissible evidence and reasonable inferences therefrom, not contradicted by other evidence or inferences, that there is no triable issue as to Cross-Defendants' liability under the Coastal Act, as pled in the first through fifth causes of action in the cross-complaint, and that summary adjudication should be granted in Cross-Complainant's favor for the following reasons:

1. On December 19, 1979, and May 10, 1990, Cross-Complainant California Coastal Commission issued coastal development permits to Larry Thorne and David Leanse ("permits") that required the recombination, via the recordation of deed restrictions, of 77 former individual lots into 2 larger lots that are subdivisions of Tract Number 9604 as recorded with the Los Angeles County

Recorder's Office. (Separate Statement of Facts ("Sep. State."), Facts 1, 9, 17, 25 and 33.)

2. These deed restrictions state in relevant part that: "All portions of the subject Lands shall be recombined and unified, and shall henceforth be considered and treated as a single parcel of land for all purposes with respect to the lands included therein, including but not limited to sale, conveyance, development, taxation, or encumbrance. The single parcel created herein shall not be divided or otherwise alienated from the combined and unified parcel." (Sep. State., at Facts 2, 10, 18, 26 and 34.)

3. Each recorded restriction also provides that "[a]ny breach of this Declaration of Restrictions shall . . . render the [landowners] or their successors liable pursuant to the [Coastal Act]." (Sep. State., at Facts 3, 11, 19, 27 and 35.)

4. Further, each restriction "shall constitute a covenant running with the land . . . [and] shall bind the [landowners] and their successors, heirs, and assigns in perpetuity and shall benefit the People of the State of California." (Sep. State., at Facts 4, 12, 20, 28 and 36.)

5. In February of 1991, the Cross-Defendants purchased a total of 54 of the 77 deed restricted lots from the prior owners. (Sep. State., at Facts 5, 13, 21, 29 and 37.)

6. Specifically, the ten Cross-Defendants purchased the restricted lots as follows: Ojavan Investors, Inc.: lots 9, 10, 11, 12, 13 and 14; Port Lemore Corporation: lots 15, 16, 22, 24, 25 and 26; Malek Agency, Ltd.: lots 132, 133, 134, 135, 136 and 137; MTG Alliance Corporation: lots 120, 121, 122, 123, 124 and 125; Sealubber, Inc.: lots 31, 32,

33 and 34; Sutton Properties, Inc.: lots 126, 127, 128, 129, 130 and 131; Pakid Holdings, Inc.: lots 138, 64, 65, 85, 115 and 116; Quelimane Co.: lots 27, 28, 29 and 30; Highland Group, Inc.: lots 61, 62, 63, 117, 118 and 119; P. U. Enterprises, Inc.: lots 35, 36, 37 and 38. (Sep. State., at Facts 6, 14, 22, 30 and 38.)

7. Seven of the above Cross-Defendants subsequently sold deed restricted lots to 17 third parties. Specifically, Ojavan Investors, Inc. sold 3 lots, Malek Agency, Ltd. sold 3 lots, Pakid Holdings, Inc. sold 5 lots, Sutton Properties, Inc. sold 3 lots, Quelimane Co. sold 1 lot, Sealubber, Inc. sold 3 lots, and Port Lemore Corporation sold 1 lot. (Sep. State, at Facts 7, 15, 23, 31 and 39.)

8. Cross-Defendants unsuccessfully sued the Commission herein in an attempt to invalidate the coastal permits' restrictions. That is, on May 14, 1993, the Hon. Jerry K. Fields granted the Commission's motion for judgment on the pleadings and dismissed Cross-Defendants' amended complaint as barred by the statute of limitations. The Hon. Robert H. O'Brien dismissed with prejudice a related action for the same reason. (Sep. State., at Facts 8, 16, 24, 32 and 40.)

IT IS THEREFORE ORDERED that Cross-Complainant Coastal Commission's motion for summary adjudication is GRANTED and that no further evidence or proof on Cross-Defendants' liability under the Coastal Act, as pled in the first through fifth causes of action, shall be required to the trial of this action, and that the final judgment herein shall, in addition to any other matters determined at the trial, be based upon that issue so established in the Commission's favor.

This order does not determine the amount of Coastal Act penalties to be imposed upon any of the Cross-Defendants nor does it address any other relief that may be appropriately ordered by the Court at a later date.

DATE: March 23, 1994

/s/ DAVID A. WORKMAN
JUDGE OF THE
SUPERIOR COURT

APPENDIX D

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

OJAVAN INVESTORS, INC., et al., Plaintiffs, v. CALIFORNIA COASTAL COMMISSION, et al., Defendants.	No. BC059661 ASSIGNED TO JUDGE DAVID A. WORKMAN ORDER GRANTING MOTION FOR ISSUE AND MONETARY SANCTIONS DATE: February 28, 1994 TIME: 8:30 a.m. PLACE: Dept. 40 Trial Date: None Motion Cut-Off: None Discovery Cut-Off: None (Filed March 3, 1994)
AND RELATED CROSS-ACTION.	

Cross-Complainants' (collectively "Coastal Commission") motion for issue and monetary sanctions came on regularly on February 28, 1994, in Department 40 of the above-captioned Court located at 111 North Hill Street,

Los Angeles, California, the Honorable David A. Workman presiding. Daniel E. Lungren, Attorney General, appeared by Daniel A. Olivas, Deputy Attorney General, on behalf of the Coastal Commission. William Bloch, Esq. of the firm McMillan & Bloch appeared on behalf of Cross-Defendants Ojavan Investors, Inc., Port Lemoore Corporation, Sutton Properties Inc., Sealubber, Inc., Pakid Holdings, Malek Agency Ltd., Quelimane Corp., MTG Alliance Corp., Western Land Bank, Highland Group, Inc., and P.U. Enterprises (collectively "Cross-Defendants").

After review of the Coastal Commission's moving and reply papers, as well as Cross-Defendants' opposing memoranda, and after oral argument,

THE COURT ORDERS THAT:

1. The Coastal Commission's motion for the imposition of issue sanctions is GRANTED. (Code of Civ. Proc. section 2023(b)(2).) The Court finds that Cross-Defendants have misused the discovery process by failing to respond to an authorized method of discovery (e.g., demand for production of documents), as well as by disobeying a court order to provide such discovery. Accordingly, the Court orders that the facts alleged in paragraph 10 of the cross-complaint are deemed to be established in accordance with the Coastal Commission's claim, to wit: Cross-Defendants are sham corporations, and they are the alter egos, instrumentalities, conduits of, and mere shells for Cross-Defendant Peter D. Bogart. The Coastal Commission, therefore, is relieved from producing any further evidence in support of its alter ego claim, and Cross-Defendants are precluded from presenting any

evidence in opposition to the Coastal Commission's alter ego claim.

2. Further, based on the above-described misuse of the discovery process, the Coastal Commission's motion for the imposition of monetary sanctions is GRANTED. (Code of Civ. Proc. section 2023(b)(1).) Monetary sanctions are imposed on Cross-Defendants and their counsel, both jointly and severally, in the amount of $540.00 which represents the Coastal Commission's fees expended in bringing this motion. Cross-Defendants' counsel shall, within ten (10) days of February 28, 1994, pay the Coastal Commission by delivery of the above amount to the Office of the Attorney General, 300 South Spring Street, Suite 5212, Los Angeles, California 90013, to the attention of Deputy Attorney General Daniel A. Olivas. Cross-Defendants and their counsel shall make the sanctions payable to the "California Coastal Commission."

DATE: March 02, 1994

/s/ DAVID A. WORKMAN
JUDGE OF THE
SUPERIOR COURT

APPENDIX E

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CALIFORNIA COASTAL COMMISSION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

OJAVAN INVESTORS, INC., et al., Plaintiffs, v. CALIFORNIA COASTAL COMMISSION, et al., Defendants.	No. BC059661 ASSIGNED TO JUDGE RUTH ESSEGIAN PERMANENT INJUNCTION (Filed Oct. 7, 1994) Trial Date: 8/8/94
AND RELATED CROSS-ACTION.	Motion Cut-Off: 4/22/94 Discovery Cut-Off: 4/22/94

Cross-Complainant California Coastal Commission ("Coastal Commission") prevailed on its injunctive cause of action when the Court granted its summary adjudication motion as to the First Cause of Action. (*See* Order

Granting Summary Adjudication of Cross-Defendants' Liability Under the Coastal Act of 1976, filed herein on March 23, 1994, at p. 2, lines 10-18.) In that order, the Court determined that the Coastal Commission is entitled to the permanent injunction pled in its cross-complaint against Cross-Defendants Ojavan Investors, Inc., Port Lemore Corporation, Sutton Properties Inc., Sealubber, Inc., Pakid Holdings, Malek Agency Ltd., Quelimane Corp., MTG Alliance Corp., Highland Group, Inc., and P.U. Enterprises. (*Id.*, at p. 2, lines 5-9.) Specifically, the Court has determined that appropriate permanent injunctive relief requires each of these Cross-Defendants to comply with the terms of the Thorne and Leanse permits and to refrain from violating the permits in the future. This entails a full rescission of the transfers such that all 77 of the properties that are the subject of this lawsuit are recombined into 2 lots pursuant to the Thorne and Leanse permits.

The Court has determined that Cross-Defendant Peter D. Bogart is liable for each of the violations committed by the above-delineated corporate Cross-Defendants because the Court ruled that the corporate Cross-Defendants "are sham corporations, and they are the alter egos, instrumentalities, conduits of, and mere shells for Cross-Defendant Peter D. Bogart." (Order re Issue and Monetary Sanctions, filed herein on March 3, 1994, at p. 2, lines 20-23.) (Hereinafter, Cross-Defendant Bogart and his sham corporations shall be referred to collectively as "Cross-Defendant Bogart.")

The Court has signed and entered a stipulated judgment between the Coastal Commission and the original

owner of the properties that are the subject of this lawsuit, Cross-Defendant Dan Z. Bochner. (*See* Judgment Pursuant to Stipulation of Parties, filed herein on July 26, 1994, at ¶ 3.) Cross-Defendant Bochner has agreed to the issuance of permanent injunctive relief against himself that would rescind the sales of the subject properties to Cross-Defendant Bogart such that Cross-Defendant Bochner again holds all such lots as recombined pursuant to the Declarations of Restrictions. (*Id.*)

The Court has also approved and entered stipulated judgments between the Coastal Commission and each of the seventeen third party purchaser Cross-Defendants including Cross-Defendants Bibekanand and Snehalata Satpathy, Dariush Lamy, Paolino and Josephine Donna Ragusa, Muzahim A. Samara, Hsiao-Hui and Hwang Jia-Yuh Shen, Gustavo Acero, Julie Ruth Morris, Domingo and Violeta Garnica, Sahib Singh, Juliette Shirikjian, Sevak J. Khatchadorian, Naina M.A. and Fathima Rahman. Each of these Cross-Defendants has agreed to abide by any Court issued or stipulated injunction that the Coastal Commission may obtain that would undo the transfer of the subject lots. (Judgments Pursuant to Stipulation of Parties, at ¶ 4, filed herein on July 8, 1993, August 6, 1993, October 7, 1993, October 12, 1993, and November 3, 1993.) (Hereinafter, the foregoing Cross-Defendants shall be referred to collectively as "Third Party Purchaser Cross-Defendants.")

IT IS THEREFORE ORDERED that a permanent injunction shall issue as follows:

1. Within twenty (20) days from the date of this order, Cross-Defendant Bogart shall fully rescind each of

his illegal sales of deed restricted lots to the Third Party Purchaser Cross-Defendants. This rescission shall include a full refund by Cross-Defendant Bogart of all money paid by the Third Party Purchaser Cross-Defendants to acquire the subject properties.

2. Within forty (40) days from the date of this order, Cross-Defendant Bochner shall fully rescind each of his illegal sales of deed restricted lots to Cross-Defendant Bogart. (*See* Judgment Pursuant to Stipulation of Parties, filed herein on July 26, 1994, at ¶ 5.) To prevent any unjust enrichment of Cross-Defendant Bogart, the $51,000 he paid to Cross-Defendant Bochner for the properties shall be credited against the Coastal Commission's judgment on its cross-action against Cross-Defendant Bogart.

3. Within sixty (60) days from the date of this order, Cross-Defendant Bogart shall submit to the Court proof to the satisfaction of the Court that the above rescissions have been completed in full.

4. All Cross-Defendants herein are hereby ordered to comply with the terms of the Thorne and Leanse permits and each Cross-Defendant is permanently enjoined from again violating such permits.

5. All Cross-Defendants herein are permanently enjoined from engaging in any violation of the Coastal Act.

DATE: October 7, 1994

/s/ Ruth Essegian
Judge of the Superior Court

APPENDIX F

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(Filed Aug. 04, 1994)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

OJAVAN INVESTORS, INC., et al., Plaintiffs, v. CALIFORNIA COASTAL COMMISSION, et al., Defendants.	No. BC059661 ASSIGNED TO JUDGE DAVID A. WORKMAN ORDER GRANTING CALIF. COASTAL COMMISSION'S MOTION IN LIMINE TO PRECLUDE JURY TRIAL ON COASTAL ACT ISSUES
AND RELATED CROSS-ACTION.	Date: Aug. 4, 1994 Time: 9:00 a.m. Place: Dept. 40 Trial Date: 8/8/94 Motion cut-Off: 4/22/94 Discovery Cut-Off: 4/22/94

Cross-Complainant California Coastal Commission's motion in limine to preclude jury trial on the Coastal Act issues came on regularly on August 4, 1994, in Department 40 of the above-captioned Court located at 111 North Hill Street, Los Angeles, California, the Honorable David A. Workman presiding and Daniel A. Olivas, Deputy Attorneys General, on behalf of the Coastal Commission. The firm of McMillan & Bloch appeared on behalf of Cross-Defendants Peter D. Bogart, Ojavan Investors, Inc., Port Lemore Corporation, Sutton Properties Inc., Sealubber, Inc., Pakid Holdings, Malek Agency Ltd., Quelimane Corp., MTG Alliance Corp., Highland Group, Inc., and P.U. Enterprises (collectively "Cross-Defendants").

After review of the moving and opposing memorandum and after oral argument.

THE COURT GRANTS THE MOTION AND ORDERS THAT, in the remaining trial in this matter, none of the parties shall have a right to a jury in the above captioned cause because the only remaining issues are those raised in the Coastal Commission's cross-complaint brought pursuant to the California Coastal Act of 1976, Public Resources Code § 30000 *et seq.*, and such claims are equitable in nature.

DATED: August 4, 1994

/s/ DAVID A. WORKMAN
JUDGE OF THE
SUPERIOR COURT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

OJAVAN INVESTORS, INC., et al., Plaintiffs, v. CALIFORNIA COASTAL COMMISSION, et al., Defendants. AND RELATED CROSS-ACTION.	No. BC059661 ASSIGNED TO JUDGE DAVID A. WORKMAN ORDER GRANTING CALIF. COASTAL COMMISSION'S MOTION IN LIMINE Date: Aug. 4, 1994 Time: 9:00 a.m. Place: Dept. 40 Trial Date: 8/8/94 Motion cut-Off: 4/22/94 Discovery Cut-Off: 4/22/94

Cross-Complainant California Coastal Commission's motion in limine came on regularly on August 4, 1994, in Department 40 of the above-captioned Court located at

111 North Hill Street, Los Angeles, California, the Honorable David A. Workman presiding. Daniel E. Lungren, Attorney General, appeared by G. R. Overton and Daniel A. Olivas, Deputy Attorneys General, on behalf of the Coastal Commission. The firm of McMillan & Bloch appeared on behalf of Cross-Defendants Peter D. Bogart, Ojavan Investors, Inc., Fort Lemore Corporation, Sutton Properties Inc., Sealubber, Inc., Pakid Holdings, Malek Agency Ltd., Quelimane Corp., MTG Alliance Corp., Highland Group, Inc., and P.U. Enterprises (collectively "Cross-Defendants").

After review of the moving and opposing memoranda, and after oral argument,

THE COURT GRANTS THE MOTION AND ORDERS THAT, in the remaining trial in this matter, Cross-Defendants are prohibited from introducing any evidence or argument which supports any of the following claims of Cross-Defendants:

1. The Coastal Commission is guilty of laches;

2. The Coastal Commission has failed to enforce the deed restrictions or the permits within any binding statutory limitation period;

3. The Coastal Commission is estopped from enforcing the deed restrictions or the permits;

4. The Coastal Commission has waived its right to enforce the permit and deed restrictions against the Cross-Defendants on the ground that the Coastal Commission allowed or acquiesced in tax sales of some of the restricted lots by the County of Los Angeles;

5. The deed restrictions relevant to this action are invalid or unenforceable;

6. The coastal development permits relevant to this action are invalid or unenforceable;

7. The permits or the deed restrictions violate the Subdivision Map Act relating to merger (Govt. Code § 66410 *et seq.*);

8. The Cross-Defendants had no actual or constructive notice of the deed restrictions;

9. The Cross-Defendants' conduct in selling or transferring deed restricted property was not knowing or intelligent or was done in good faith; and

10. The corporate Cross-Defendants are not sham corporations and are not the alter egos of Cross-Defendant Peter D. Bogart.

THE COURT FURTHER ORDERS THAT: (1) Cross-Defendants and their attorneys are prohibited from introducing or attempting to introduce, any evidence related to the above-listed categories during trial of this action, unless and until it is first determined to be admissable evidence in this trial; and (2) attorneys for the Cross-Defendants shall instruct the parties they represent and their witnesses to refrain from mentioning or referring to the above-listed categories or any facts related to those categories at any time unless and until facts related to the above-listed categories are determined to be admissable by this Court

DATED: AUG 4 1994

/s/ DAVID WORKMAN
JUDGE OF THE
SUPERIOR COURT

APPENDIX G

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 7 DATE: 05/15/97

Fosbinder & Fosbinder
James H. Fosbinder
723 Ocean Front Walk
Venice, CA. 90291

RE: Ojavan Investors, Inc.
vs.
California Coastal Commission
2 Civil B089152
Los Angeles NO. BC059661

THE COURT:

Petition for rehearing denied.

APPENDIX H

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 7 DATE: 05/07/97

Fosbinder & Fosbinder
James H. Fosbinder
723 Ocean Front Walk
Venice, CA. 90291

RE: Ojavan Investors, Inc.
vs.
California Coastal Commission
2 Civil B089152
Los Angeles NO. BC059661

THE COURT:

LEAVE TO FILE BOGART REHEARING PETITION DENIED.

APPENDIX I

Second Appellate District, Division Seven, No. B089152
S045246

IN THE SUPREME COURT OF CALIFORNIA

OJAVAN INVESTORS Et Al., Appellants

v.

CALIFORNIA COASTAL COMMISSION, Respondent

(Filed Jul. 9, 1997)

Petition for review DENIED.

Werdegar, J., is of the opinion the petition should be granted.

/s/ George
Chief Justice

APPENDIX J

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE SECOND APPELLATE DISTRICT

DIVISION: 7

Fosbinder & Fosbinder
James H. Fosbinder
723 Ocean Front Walk

Venice, CA. 90291

RE: Ojavan Investors, Inc.
vs.
California Coastal Commission
2 Civil B089152
Los Angeles NO. BC059661

Judge:

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 04/17/97 is now final.

* * Affirmed In Full. * *

Appellants To Pay Respondents' Costs.

AUG 8 1997

JOSEPH A. LANE, Clerk

By: /s/ E. Amos
Deputy Clerk

APPENDIX K

Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Seventh Amendment to the United States Constitution:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

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PUBLIC RESOURCES CODE
DIVISION 20. CALIFORNIA COASTAL ACT
CHAPTER 1. Findings and Declarations and General Provisions

Cal Pub Resources Code @ 30001 (1992)

@ 30001. Value of coastal zone

The Legislature hereby finds and declares:

(a) That the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balstem.

(b) That the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation.

(c) That to promote the public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction.

(d) That existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coastal zone.

HISTORY:

Added Stats 1976 ch 1330 @ 1; Amended Stats 1979 ch 1090 @ 1.

NOTES:
AMENDMENTS:

1979 Amendment: Added subd (d).

HISTORICAL DERIVATION:

Former @ 27001, as added by initiative act approved November 7, 1972.

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PUBLIC RESOURCES CODE
DIVISION 20. CALIFORNIA COASTAL ACT
CHAPTER 1. Findings and Declarations and General Provisions

Cal Pub Resources Code @ 30002 (1992)

@ 30002. Existence of coastal plan

The Legislature hereby finds and declares that:

(a) The California Coastal Zone Conservation Commission, pursuant to the California Coastal Zone Conservation

Act 1972 (commencing with Section 27000), has made a detailed study of the coastal zone that there has been extensive participation by other governmental agencies, private interests, and the general public in the study; and that, based on the study, the commission has prepared a plan for the orderly, long-range conservation, use, and management of the national, scenic, cultural, recreational, and manmade resources of the coastal zone.

(b) Such plan contains a series of recommendations which require implementation by the Legislature and that some of those recommendations are appropriate for immediate implementation as provided for in this division while others require additional review.

HISTORY:

Added Stats 1976 ch 1330 @ 1.

NOTES:
EDITOR'S NOTES:

The California Coastal Zone Conservation Act of 1972 (commencing with @ 27000), was repealed in 1977. Most of its provisions were reenacted in the California Coastal Act of 1976 (commencing with @ 30000).

HISTORICAL DERIVATION:

Former @ 27001, as added by initiative act approved November 7, 1972.

CROSS REFERENCES:

Creation, membership, and powers of the California Coastal Commission: Pub Res C @@ 30300 et seq.

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PUBLIC RESOURCES CODE
DIVISION 20. CALIFORNIA COASTAL ACT
CHAPTER 1. Findings and Declarations and General Provisions

Cal Pub Resources Code @ 30003 (1992)

@ 30003. Compliance by public agencies

All public agencies and all federal agencies, to the extent possible under federal law or regulations or the United States Constitution, shall comply with the provisions of this division.

HISTORY:

Added Stats 1976 ch 1330 @ 1.

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PUBLIC RESOURCES CODE
DIVISION 20. CALIFORNIA COASTAL ACT
CHAPTER 9. Judicial Review, Enforcement, and Penalties
ARTICLE 1. General Provisions

Cal Pub Resources Code @ 30810 (1992)

@ 30810. Cease and desist orders issued by commission

(a) If the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing a permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist. The order may also be issued pursuant to the request of a city or county for an activity that is inconsistent with the permit requirements of the certified local coastal program of that city or county.

(b) The cease and desist order may be subject to such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to this division.

(c) Notice of the public hearing on a proposed cease and desist order shall be given to all affected persons and

agencies and the order shall be final and effective upon the issuance of the order. Copies shall be served forthwith by certified mail upon the person or governmental agency subject to the order and upon other affected persons and agencies who appeared at the hearing or requested a copy. The notice shall include a description of the civil remedy to a cease and desist order, authorized by Section 30803.

HISTORY:

Added Stats 1991 ch 761 @ 4 (SB 317).

NOTES:
CROSS REFERENCES:

Civil liability for violation of cease and desist orders: Pub Res C @ 30821.6.

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PUBLIC RESOURCES CODE
DIVISION 20. CALIFORNIA COASTAL ACT
CHAPTER 9. Judicial Review, Enforcement, and Penalties
ARTICLE 2. Penalties

Cal Pub Resources Code @ 30820 (1992)

@ 30820. Civil fine

Any person who violates any provision of this division shall be subject to a civil fine of not to exceed ten thousand dollars ($ 10,000).

HISTORY:

Added Stats 1976 ch 1330 @ 1.

NOTES:
HISTORICAL DERIVATION:

Former @@ 27234, 27500, as added by initiative act approved November 7, 1972.

CROSS REFERENCES:

Civil fine for intentional violation: Pub Res C @ 30821.

Exemplary damages: Pub Res C @ 30822.

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PUBLIC RESOURCES CODE
DIVISION 20. CALIFORNIA COASTAL ACT
CHAPTER 9. Judicial Review, Enforcement, and Penalties
ARTICLE 2. Penalties

Cal Pub Resources Code prec @ 30820 (1992)

Preceding @ 30820.

HISTORY: ARTICLE HISTORY:

[Division 20, California Coastal Act – Chapter 9, Judicial Review, Enforcement, and Penalties – Article 2, Penalties; added by Stats 1976 ch 1330 @ 1.].

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PUBLIC RESOURCES CODE
DIVISION 20. CALIFORNIA COASTAL ACT
CHAPTER 9. Judicial Review, Enforcement, and Penalties
ARTICLE 2. Penalties

Cal Pub Resources Code @ 30821 (1992)

@ 30821. Civil fine; Intentional and knowing violations

In addition to any other penalties, any person who intentionally and knowingly performs any development in violation of this division shall be subject to a civil fine of not less than fifty dollars ($ 50) nor more than five thousand dollars ($ 5,000) per day for each day in which such violation occurs.

HISTORY:

Added Stats 1976 ch 1330 @ 1.

NOTES:
HISTORICAL DERIVATION:

Former @ 27501, as added by initiative act approved November 7, 1972.

CROSS REFERENCES:

Cease and desist orders issued by executive director: Pub Res C @ 30809.

Cease and desist orders issued by commission: Pub Res C @ 30810.

Civil fine: Pub Res C @ 30820.

Exemplary damages: Pub Res C @ 30822.

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PUBLIC RESOURCES CODE
DIVISION 20. CALIFORNIA COASTAL ACT
CHAPTER 9. Judicial Review, Enforcement, and Penalties
ARTICLE 2. Penalties

Cal Pub Resources Code @ 30822 (1992)

@ 30822. Exemplary damages

Where a person has intentionally and knowingly violated any provision of this division, the commission may maintain an action, in addition to Section 30801, for exemplary damages and may recover an award, the size of which is left to the discretion of the court. In exercising its discretion, the court shall consider the amount of liability necessary to deter further violations.

HISTORY:

Added Stats 1976 ch 1330 @ 1.

NOTES:
CROSS REFERENCES:

Judicial review of decision or action of commission or regional commission: Pub Res C @ 30801.

Civil fine for intentional violations: Pub Res C @ 30821.

THE CALIFORNIA CODE OF REGULATIONS
(Current Through 1997)

Subchapter 7. Enforcement and Violation of Permits

Article 1. Enforcement Responsibilities

* * *

§ 13172. Violation of Permits.

Violation of a permit or any term, condition, or provision of a permit is grounds for enforcement under this Section and under Chapter 9 of the California Coastal Act of 1976. Whenever the executive director of the commission determines that a violation of a permit or term, condition, or provision of a permit has occurred or is threatened, the executive director shall refer the matter to the Attorney General for appropriate action. Where such a violation has occurred or is threatened, the Attorney General may file an action in the name of the commission for equitable relief to enjoin such violation of, or for, civil penalties, or both, or may take other appropriate action pursuant to Chapter 9 of the California Coastal Act of 1976.

HISTORY

1. Amendment filed 6-10-77; effective thirtieth day thereafter (Register 77, No. 24).

§ 13173. Enforcement of the Coastal Act.

Whenever the executive director of the commission determines that any violation of the provisions of the California Coastal Act of 1976 has occurred or is threatened, the Attorney General may file an action in the name

of the commission for equitable relief to enjoin such violation, or for civil penalties, or both, or may take other appropriate action pursuant to Chapter 9 of the California Coastal Act of 1976.

NOTE: Authority cited: Sections 30331 and 30333. Public Resources Code Reference Chapters 1, 2, 4 and 7 of Division 20, Public Resources Code.

HISTORY

1. New section filed 2-11-77 as an emergency: effective upon filing (Register 77, No. 7).

2. Certificate of Compliance filed 4-29-77 (Register 77, No. 18).

3. Amendment filed 6-10-77; effective thirtieth day thereafter (Register 77, No. 24).

* * *

THE CALIFORNIA COASTAL ACT
(Public Resources Code, West Pub. 1996)

* * *

§ 30803. Declaratory and equitable relief; cease and desist orders; restoration orders; bonds; stay

(a) Any person may maintain an action for declaratory and equitable relief to restrain any violation of this division, of a cease and desist order issued pursuant to Section 30809 or 30810, or of a restoration order issued pursuant to Section 30811. On a prima facie showing of a violation of this division, preliminary equitable relief shall be issued to restrain any further violation of this division. No bond shall be required for an action under this section.

(b) A court may stay the operation of the cease and desist order after it provides notice to the commission and holds a hearing. Any such stay may be imposed or continued only if it is not against the public interest.

(added by Stats. 1976, c. 1330, § 1. Amended by Stats.1991, c. 761 (S.B.317), § 1; Stats.1993, c. 1199 (S.B.608), § 1.)

* * *

§ 30805. Recovery of civil penalties

Any person may maintain an action for the recovery of civil penalties provided for in Section 30820 or 30821.6.

(Added by Stats.1976, c. 1330, § 1 Amended by Stats.1991, c. 761 (S.B.317), § 2; Stats.1992, c. 1088 (S.B.1578), § 3, eff. Sept. 29, 1992; Stats.1993, c. 1199 (S.B.608).

* * *

§ 30820. Civil liability; violations; amount; factors

(a) Any person who violates any provision of this division may be civilly liable in accordance with this subdivision as follows:

(1) Civil liability may be imposed by the superior court in accordance with this article on any person who performs or undertakes development that is in violation of this division or that is inconsistent with any coastal development permit previously issued by the commission, a local government that is implementing a certified local coastal program, or a port governing body that is implementing a certified port master plan, in an amount that shall not exceed thirty thousand dollars ($30,000) and shall not be less than five hundred dollars ($500).

(2) Civil liability may be imposed for any violation of this division other than that specified in paragraph (1) in an amount that shall not exceed thirty thousand dollars ($30,000).

(b) Any person who performs or undertakes development that is in violation of this division or that is inconsistent with any coastal development permit previously issued by the commission, a local government that is implementing a certified local coastal program, or a port governing body that is implementing a certified port master plan, when the person intentionally and knowingly performs or undertakes the development in violation of this division or inconsistent with any previously issued coastal development permit, may, in addition to

any other penalties, be civilly liable in accordance with this subdivision. Civil liability may be imposed by the superior court in accordance with this article for a violation as specified in this subdivision in an amount which shall not be less than one thousand dollars ($1,000), nor more than fifteen thousand dollars ($15,000), per day for each day in which the violation persists.

(c) In determining the amount of civil liability, the following factors shall be considered:

(1) The nature, circumstance, extent, and gravity of the violation.

(2) Whether the violation is susceptible to restoration or other remedial measures.

(3) The sensitivity of the resource affected by the violation.

(4) The cost to the state of bringing the action.

(5) With respect to the violator, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic profits, if any, resulting from, or expected to result as a consequence of, the violation, and such other matters as justice may require.

(Added by Stats.1992, c. 955 (S.B.1449), § 2, Amended by States.1993, c. 1199 (S.B. 608), § 5.)

* * *

§ 30821.6. Violation of orders; civil penalties; local government agency actions

(a) Any person or governmental agency who intentionally or negligently violates any cease and desist order issued, reissued, or amended by the executive director or the commission, or any restoration order issued, reissued, or amended by the commission, a local government that is implementing a certified local coastal program, or a port governing body that is implementing a certified port master plan may be liable civilly in a sum of not to exceed six thousand dollars ($6,000) for each day in which that violation persists. Any actual penalty imposed shall be reasonably proportionate to the damage suffered as a consequence of the violation.

(b) Sections 30809 and 30810 and subdivision (a) of this section do not authorize the issuance or enforcement of any cease and desist order as to any activity undertaken by a local governmental agency pursuant to a declaration of emergency by the board of supervisors of the county in which the activity is being or may be undertaken.

(Added by Stats.1991, c. 761 (S.B.317), § 5. Amended by Stats.1993, c. 1199 (S.B.608), § 6.)

* * *

§ 30822. Exemplary damages

Where a person has intentionally and knowingly violated any provision of this division or any order issued pursuant to this division, the commission may maintain

an action in addition to Section 30803 or 30805, for exemplary damages and may recover an award, the size of which is left to the discretion of the court. In exercising its discretion, the court shall consider the amount of liability necessary to deter further violations.

(Added by Stats.1976, c. 1330, § 1, Amended by Stats.1993, c. 1199 (S.B.608), § 7.)

* * *

(2)

No. 97-621

Supreme Court, U.S.
FILED
NOV 4 1997
CLERK

In The

Supreme Court of the United States

October Term, 1997

OJAVAN INVESTORS, INC., et al.,

Petitioners,

vs.

CALIFORNIA COASTAL COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Seven

RESPONDENT CALIFORNIA COASTAL COMMISSION'S BRIEF IN OPPOSITION TO PETITION

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28pp

QUESTIONS PRESENTED

1. Do Petitioners' 73 separate knowing and intentional violations of the California Coastal Act support the civil fines imposed by the court?

2. Are the California Coastal Act's injunctive and monetary remedies civil in nature when they are designed and intended to protect the public's interest in the state's coast, obtain compliance with the Act and remediate environmental degradation within the coastal zone?

3. Do enforcement actions brought pursuant to the California Coastal Act sound in equity such that there is no right to a trial by jury?

4. By virtue of the final decision of *Ojavan Investors, Inc. v. California Coastal Com.*, 26 Cal.App.4th 516, 32 Cal.Rptr.2d 103 (1994), *cert. denied*, 513 U.S. 1148 (1995), are Petitioners barred by the *res judicata* doctrine from renewing their challenge to the underlying coastal development permits?

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RESPONDENT CALIFORNIA COASTAL COMMISSION'S BRIEF IN OPPOSITION TO PETITION

Respondent California Coastal Commission ("Coastal Commission")[1] respectfully requests this Court to deny the petition for writ of certiorari seeking review of the opinion of the California Court of Appeal.

RELATED PETITION

Simultaneously with the instant petition, Petitioners filed a petition for writ of certiorari in related litigation. (*Peter D. Bogart, et al. v. California Coastal Com.*, Supreme Court Docket No. 97-622.) The petitions are related because they both arise from the same factual circumstances.

REASONS FOR DENYING THE WRIT

The writ should be denied because: (1) the state court has not decided an important federal question in any way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (2) the

[1] As noted at page ii of Petitioners' brief, the Coastal Commission was the respondent, appellee and cross-complainant below. The individual Commissioners, in-house counsel, and enforcement staff, all of whom are delineated in Petitioners' caption, were initially sued by Petitioners. They were dismissed by the trial court and Petitioners eventually abandoned that portion of the litigation. Accordingly, only the Coastal Commission appears as respondent before this Court.

state court has not decided any important federal question that has not been, but should be, decided by this Court; and (3) the state court has not decided an important federal question in any way that conflicts with relevant decisions of this Court. (Sup. Ct. R. 10, subd. (b), (c).)

First, the Coastal Act fines imposed by the court are proportional to Petitioners' 73 separate knowing and intentional Coastal Act violations. During trial, all parties *stipulated* – without reservation – that the criteria for determining the amount of civil fines would be confined to five specific factors now codified in the California Coastal Act of 1976, Public Resources Code sections 30000 *et seq.* ("Coastal Act"). In applying the criteria, the trial court explicitly considered the mitigating factors, as well as those facts that established the seriousness of the violations. Thus, the state court correctly noted that the aggregate "amount is large only because [Petitioners] violated the Coastal Act 73 times and refused to remedy their violations." (Opinion of the state court reproduced in the Petition, Appendix A ("Pet., App. A") at p. 41a.)[2]

Second, the state court properly held that Coastal Act injunctive and monetary remedies do not fall within this Court's civil forfeiture line of cases. That body of case law arises under the Double Jeopardy Clause where a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not

---

[2] All citations to the state court decision will be to the opinion as it is reproduced at Appendix A to the Petition for Writ of Certiorari.

fairly be characterized as remedial, but only as a deterrent or retribution. The remedies in this case are civil in nature because they were designed and intended to protect the public's interest in California's coast, obtain compliance with the Coastal Act and remediate environmental degradation in the coastal zone. Consequently, Petitioners' forfeiture theory does not apply.

Third, the state court properly held that Petitioners were not entitled to a trial by jury. There is no right to a jury trial in an action sounding in equity. Where, as here, the civil fines are tied to the injunction in that the same alleged misconduct is the basis for all the types of relief sought, the issues are equitable in nature. Moreover, the Seventh Amendment jury trial guarantee has not been incorporated in the Due Process Clause of the Fourteenth Amendment and, therefore, is not binding on the states. Thus, with respect to the Seventh Amendment, the states are left to regulate trials in their own courts in their own way. In civil actions brought in California, the defendant has no right to a jury trial under the Seventh Amendment.

Finally, the state court properly rejected Petitioners' renewed attacks on the underlying coastal development permits as barred by the *res judicata* doctrine. In an earlier related case, the state court determined that the permits and their conditions were enforceable and this Court denied Petitioners' subsequent petition for writ of certiorari. That determination, therefore, is final and may not be relitigated here.

STATEMENT OF THE CASE

Though the Statement of the Case is lengthy and complex, it is nonetheless necessary for a complete understanding of Petitioners' unsuccessful and frivolous six year battle against the Coastal Commission and the Commission's successful litigation under the Coastal Act.

Furthermore, many of the relevant legal and factual issues have already been determined in the Coastal Commission's favor in the related case of *Ojavan Investors, Inc. v. California Coastal Com.*, 26 Cal.App.4th 516, 32 Cal.Rptr.2d 103 (1994), *cert. denied*, 513 U.S. 1148 (1995) (hereinafter "*Ojavan I*"). Thus, the state court held that "[s]ince *Ojavan I* is a final decision on the merits and concerned the same permits, deed restrictions and issue of whether the Commission's cease-and-desist order is enforceable against Ojavan Investors, the res judicata doctrine prohibits relitigation of matters already determined in *Ojavan I*." (Pet., App. A at p. 12a.) Petitioners do not challenge this holding in their petition for review. Accordingly, where appropriate, the Coastal Commission will base factual references on the appellate record and/or the related *Ojavan I* decision.

A. The Underlying Facts

The California Legislature has declared that the California Coastal Act "shall be liberally construed to accomplish its purposes and objectives." (Pub. Resources Code § 30009.) One such objective is to " '[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and

artificial resources.' " (*Ojavan I, supra,* 26 Cal.App.4th at 520, quoting Pub. Resources Code § 30001.5, subd. (a).)

To satisfy this objective, the Coastal Commission established the Transfer of Development Credits Program ("TDC Program") whereby new subdivisions and development projects in Malibu and the Santa Monica Mountains are approved "on the condition that the project proponents arrange to extinguish, either by direct purchase or through involvement in government programs, the development capacity of other lots." (*Ojavan I, supra,* 26 Cal.App.4th at 520.) "The TDC Program thus conditions the issuance of coastal development permits on the extinguishment of development rights as to other building sites in the coastal zone, either by offering to dedicate a scenic easement or by filing declarations of restrictions, thereby waiving development rights and unifying separate lots into one parcel." (*Ibid.*) This petition arises from the Coastal Commission's enforcement of two coastal development permits issued under the TDC Program.

On December 19, 1979, and May 10, 1990, the Coastal Commission issued coastal development permits to David Leanse and Larry Thorne ("permits"), respectively, for condominium and housing developments in the Malibu area within the coastal zone. (*Ojavan I, supra,* 26 Cal.App.4th at 521.) Messrs. Leanse and Thorne are not and have never been parties to any litigation between Petitioners and the Coastal Commission. (*Id.* at 523.) These two projects were not related to each other, but the Coastal Commission found that both projects created risks of adverse cumulative environmental impacts on coastal resources. (*Id.* at 521.) To mitigate such impacts, the Coastal Commission conditioned permit approval on

the applicants' participation in the TDC Program. (*Ibid.*) Accordingly, as a condition precedent to issuance of the permits, the applicants agreed that they would provide evidence to the Coastal Commission that development rights for residential use had been extinguished on a specified number of building sites in the coastal zone near the proposed projects. (*Ibid.*)

The permit applicants fulfilled the TDC condition by purchasing, in the private market place, the right to have other, unrelated landowners record documents restricting development on privately owned lots. (*Ojavan I, supra,* 26 Cal.App.4th at 521.) One restriction, known as an Offer To Dedicate a Scenic Easement, extinguished the building rights on the subject lots by transferring such rights to the permit applicants' own properties. (*Ibid.*) The other restriction was embodied in four Declarations of Restrictions which "recombine[d] and unif[ied] the Subject lands into a single parcel for all purposes . . . including but not limited to sale, conveyance, development, taxation or encumbrance [so that] the proposed development is in conformity with the [Coastal] Act. . . . " (*Ibid.*) These declarations expressly state that any violation of the restrictions "shall render the landowners or their successors liable pursuant to the provisions of [the Coastal Act]." (*Id.* at 522.) Pursuant to their respective agreements with the permit applicants, Petitioners' predecessors in interest recorded the Declarations of Restrictions on their lots between July 1981 and June 1990. (*Id.* at 521.) The result was that the 77 former individual lots were recombined into 2 larger lots. (*Id.* at 522.) Thus, either or both of the 2 newly recombined lots could be sold, but the former

77 lots could not be sold-off individually. (*Ibid.*) Ultimately, the deed restricted lots arising from the separate Leanse and Thorne permit transactions came to be held by a common owner, Dan Bochner. (*Ibid.*)

In February 1991, without the knowledge or approval of the Coastal Commission and in violation of the permits' restrictions (*Ojavan I, supra,* 26 Cal.App.4th at 522, 525), Petitioners purchased a total of 54 of the 77 deed restricted lots from Mr. Bochner (Clerk's Transcript ("CT") 2234-2243, 2671-2672). Between April 2, 1991, and January 26, 1992, Petitioners then proceeded to sell a total of 19 deed restricted lots to third parties. (CT 2672, 2244-2261.) In the auction brochure, Petitioners stated:

> "Unbelievably cheap, due to restrictions on development. Economists tell us the government is broke, and only development money can fill the bureaucrats' maws. They'll *have* to develop!" (*Ojavan I, supra,* 26 Cal.App.4th at 522, emphasis original.)

Based on this representation, as well as assurances from Petitioners, the third party purchasers were led to believe that they could build on the lots despite the previously-recorded restrictions on development. (Reporter's Transcript ("RT") 275, 322-324, 344.) After being alerted to these illegal purchases and sales of the deed restricted lots, Coastal Commission enforcement staff attempted to convince Petitioners to halt their illegal activities and voluntarily correct their violations of the Coastal Act. (CT 23-25; *Ojavan I, supra,* 26 Cal.App.4th at 522.) When these efforts proved unsuccessful because Petitioners were intractable, the Coastal Commission was

forced to issue cease and desist orders to prevent a further breach of the Declarations of Restrictions. (*Ibid.*)

B. Litigation History

In July and October of 1992, Petitioners filed two complaints for damages and one petition for administrative mandamus in the Los Angeles County Superior Court challenging the permits' deed restrictions, and the Coastal Commission's issuance of cease and desist orders thereon, alleging numerous constitutional and tort claims. (CT 1-22; *Ojavan I, supra,* 26 Cal.App.4th at 523.) The crux of their allegations was that the Declarations of Restrictions were invalid and could not be enforced. (*Ibid.*) On the Coastal Commission's motions, the trial court dismissed all three of Petitioners' actions holding that: (1) the suits were barred by the Coastal Act's 60-day statute of limitations; and (2) the suits were barred by the doctrine of waiver. (CT 797-800; *Ojavan I, supra,* at 523.)

Petitioners appealed the two dismissals in the related actions, but the Court of Appeal unanimously affirmed the trial court's judgments of dismissal. (*Ojavan I, supra,* 26 Cal.App.4th 516.) Finally, this Court denied Petitioners' petition for a writ of certiorari. (*Ojavan I, supra,* 513 U.S. 1148.)

In response to the first of the three suits filed by Petitioners, the Coastal Commission filed a cross-complaint against Petitioners, Mr. Bochner, the third party purchasers and others, for violations of the Coastal Act seeking both injunctive and civil fines. (CT 170-188.) Specifically, the Coastal Commission prayed for a permanent injunction that would require Petitioners to "undo

each violation of the terms and conditions" of the permits and for civil fines "for each individual violation of each [deed restriction] and any other violation of the Coastal Act." (CT 182, 186.) The Coastal Commission also alleged that the corporate Petitioners were "sham" and that they were "the alter egos, instrumentalities, conduits of, and mere shells for, certain individuals including, but not limited to, [Petitioner] PETER D. BOGART. . . . " (CT 173-174.)

Between July 8, 1993 and July 26, 1994, the Coastal Commission negotiated and obtained stipulated judgments with Mr. Bochner and all of the third party purchasers. (CT 892-895, 901-904, 910-913, 1210-1213, 1232-1235, 1242-1245, 1255-1258, 1379-1382, 1388-1391, 1397-1400, 1406-1409, 1479-1482, 1593-1596, 3665-3671.) With respect to the settlements with the third party purchasers, the Coastal Commission waived all civil fines and, in return, all third party cross-defendants agreed to cooperate with the Commission in obtaining injunctive relief that would undo the illegal sales transactions. (CT 892-895, 901-904, 910-913, 1210-1213, 1232-1235, 1242-1245, 1255-1258, 1379-1382, 1388-1391, 1397-1400, 1406-1409, 1479-1482, 1593-1596.) The Coastal Commission did not waive civil fines as to Mr. Bochner because he was aware of the deed restrictions when he initially sold 54 of the 77 former lots to Petitioners; therefore, Mr. Bochner agreed to pay a civil fine of $10,000 and supply a letter of credit in the amount of $92,634.30 to be used to effectuate the rescission of the sales. (CT 1593-1596.) In contrast to the actions of the third party purchasers and Mr. Bochner, Petitioners did not settle despite the numerous attempts made by the Coastal Commission.

(CT 23-25; RT 154-155; *Ojavan I, supra,* 26 Cal.App.4th at 522.)

On March 3, 1994, the trial court granted the Coastal Commission's motion for issue and monetary sanctions based on Petitioners' violation of a previously-issued discovery order. (CT 2492-2494.) Specifically, despite being ordered to produce documents regarding the Coastal Commission's alter ego allegations, Petitioners refused to do so. (CT 2451-2454.) Thus, the court found that Petitioners abused the discovery process and ruled that the Coastal Commission was "relieved from producing any further evidence in support of its alter ego claim, and [Petitioners] are precluded from presenting any evidence in opposition to the Coastal Commission's alter ego claim." (CT 2493.) Specifically, the corporate Petitioners were held to be "sham corporations" and the "alter egos, instrumentalities, conduits of, and mere shells for [Petitioner] Peter D. Bogart." (CT 2493.)

The Coastal Commission litigated its cross-complaint after the corporate veil was pierced and Petitioners' three lawsuits were dismissed. A judgment in the Coastal Commission's favor was obtained in two phases. First, the Coastal Commission filed a motion for summary adjudication of the issue of Petitioners' liability under the Coastal Act. (CT 2182.) In that motion, based on the Declarations of Restrictions, grant deeds and Petitioners' admissions to their purchases and sales of the restricted lots, the Coastal Commission contended that Petitioners' 54 purchases and 19 sales of the deed restricted lots violated the Coastal Act. (CT 2200-2205.) Petitioners opposed the motion by making three arguments: (1) the

Coastal Commission had no power to enforce the Declarations of Restrictions; (2) the Coastal Commission submitted no evidence of the underlying permits; and (3) Petitioners acted in good faith. (CT 2500-2519.)

On March 23, 1994, after hearing oral arguments, the trial court granted the Coastal Commission's motion finding that "there is no triable issue as to [Petitioners'] liability under the Coastal Act," and that, accordingly, "no further proof on [Petitioners'] liability under the Coastal Act, as pled in the first through fifth causes of action, shall be required at the trial of this action. . . . " (CT 2670, 2672.) The summary adjudication order did not address the amount of civil fines or other relief specifically reserving such remedy issues for a separate trial. (CT 2673.)

On July 15, 1994, prior to trial on the remedy phase of the litigation, the Coastal Commission filed two motions in limine. (CT 3564, 3574.) One motion was for an order precluding a jury trial on the remaining issues because the Coastal Act claims are grounded in equity and, as such, both the Coastal Commission and Petitioners were not entitled to a jury trial. (CT 3564-3571.) The Coastal Commission's other in limine motion was for an order precluding Petitioners from attempting to relitigate in the remedy phase matters already determined in the Coastal Commission's favor, such as Petitioners' liability under the Coastal Act, the Coastal Commission's right to litigate this enforcement action, and the alter ego issue. (CT 3574-3587.) Petitioners opposed both motions in limine. (CT 3752-3760, 3790-3803.) The court granted both motions. (CT 3867-3869, 3872-3873.) At the same hearing, the court issued a third order denying Petitioners'

request to allow Petitioner Bogart to use trial counsel separate from that used by the corporations because, as the Coastal Commission argued, the court had previously pierced the corporate veil and, therefore, Petitioner Bogart and his corporations were to be treated as one entity. (RT 70-79.) The court, however, allowed additional counsel to associate with existing counsel to represent the corporate entities as well as Petitioner Bogart. (RT 77.)

For the remedy phase of the litigation, the matter was transferred to a different judge for a bench trial. (CT 3918.) On the first day of trial on August 11, 1994, Petitioners improperly moved for reconsideration of the prior judge's two in limine orders and order relating to Petitioners' counsel, but the trial court denied these requests for reconsideration. (CT 3917.) Petitioners also filed a petition for writ of mandate with the appellate court seeking to stay the trial until review could be had on three orders. (*See* Court file.) The Court of Appeal denied the petition. (*Ibid.*) The trial then commenced and lasted for three days with both sides calling witnesses and introducing documentary evidence. (RT 103-521.) Though Petitioners listed Petitioner Bogart as a trial witness (CT 3764), he was never called to testify (RT 515). After trial and post-trial briefing by the parties, the matter was submitted. (RT 4070; CT 4071-4160.)

On October 7, 1994, the trial court ruled on the Coastal Commission's prayer for permanent injunctive relief holding that, because the Coastal Commission had previously "prevailed on its injunctive cause of action when [the prior judge] granted its summary adjudication motion as to the First Cause of Action[,] . . . [it already] has [been] determined that appropriate permanent

injunctive relief requires each of these Cross-Defendants to comply with the terms of the Thorne and Leanse permits and to refrain from violating the permits in the future." (CT 4166-4167.) Accordingly, the court issued a permanent injunction that required Bogart and his corporations to rescind each of the illegal sales of the deed restricted lots and make monetary restitution to the third party purchasers. (CT 4166-4169.) The court ordered that such rescission and restitution should be completed within 20 days of the injunction. (CT 4169.)

On October 14, 1994, the trial court issued a tentative statement of decision regarding the imposition of civil fines. (CT 4170-4174.) The court imposed a daily civil fine of $100 for each of the 73 violations, accruing at a rate of $7300 per day until Petitioners have complied with the permanent injunction. (CT 4173-4174.) The court also imposed a one-time civil fine of $5,000 per violation. (CT 4172.) The court declined to impose an additional civil fine because, based on the language of the Coastal Act, the extra fines "are not necessary to deter further violations" of the Act. (CT 4174.) Thus, as of the date of the tentative statement of decision, the total civil fine was $9,822,800. (CT 4172-4174.)

C. The Instant Appellate Decision

On December 5, 1994, Petitioners appealed the judgment and all orders. (CT 4365-4366.) On April 17, 1997, after briefing and argument of the parties, the California Court of Appeal for the Second Appellate District,

Division Seven, affirmed the judgment and each order in their entirety. (*See* Pet., App. A.)

ARGUMENT

I.

THE COASTAL ACT FINES ARE PROPORTIONAL TO PETITIONERS' COASTAL ACT VIOLATIONS

Petitioners argue that a civil fine that is imposed on a "per violation, per day" basis violates the Eighth Amendment to the U.S. Constitution because the resultant fine is not "proportional" to the violation. During trial, all parties stipulated that the criteria for determining the amount of fines would be confined to the five factors that the Coastal Commission utilizes in analyzing the seriousness of Coastal Act violations; the California Legislature codified the criteria in the 1992 amendments to the Coastal Act. (RT 133.) In applying the five factors, the trial court explicitly considered the mitigating factors (little or no physical damage to the properties involved; no evidence of prior violations by Petitioners), as well as those facts that established the seriousness of the violations (the number of knowing and intentional illegal acts; sensitivity of the resource; cost to the state in bringing this action; Petitioners' culpability and profits made and expected to be made). (CT 4171-4172.)

In exercising its discretion, the trial court imposed a near minimum $100 per day per violation, rejecting the Coastal Commission's appraisal of Petitioners' violations which, the Commission had maintained at trial, warranted the imposition of the maximum fines available

under the Coastal Act. (CT 4171-4172.) Thus, the Court of Appeal found that the "trial court exercised its discretion in setting the amounts of the fines, rather than mechanically adopt the Commission's position." (Pet., App. A at p. 37a.) The Court also noted that the trial court's refusal to impose any additional amounts sought by the Coastal Commission "also evidences its exercise of discretion." (*Id.* at fn. 21.)

Nowhere do Petitioners explain what level of fines would, in their estimation, pass constitutional muster. Petitioners merely assert that the Coastal Commission were "seeking a maximum of $470 million. . . . " (Pet. at p. 6.) The Coastal Commission never prayed for a specific amount of fines, nor do Petitioners offer their computations to explain how they arrived at the total "maximum" fines. In any event, the trial court did not impose the maximum.

Petitioners also gloss over the fact that the trial court was dealing with numerous separate violations. As the Court of Appeal noted, the aggregate "amount is large only because Ojavan Investors violated the Coastal Act 73 times and refused to remedy their violations." (Pet., App. A at p. 41a.) Petitioners offer no rejoinder to this assessment other than to imply that their 54 purchases and 19 sales of the deed restricted lots should not have been counted as separate violations. (Pet. at p. 3 and fn. 1.) The state court rejected this argument holding that "[s]ince the number of lot transfers totaled 73, the trial court did not err in calculating the number of violations." (Pet., App. A at p. 38a.) Petitioners do not explain why the state court should have counted the violations any differently.

Petitioners also miscast the record in two other ways. First, they assert that the "Coastal Commission was not required to provide, and failed to provide, evidence as to its actual cost and damages which would justify" the final judgment. (Pet. at p. 18.) As shown above, however, the state court explicitly considered the cost to the Coastal Commission in bringing the litigation. (CT 4171-4172.) Second, Petitioners characterize enforcement under the Coastal Act as an action for damages. (Pet. at p. 20.) In doing so, Petitioners offer no authority as support for their claims, nor can they. In truth, contemporary environmental legislation such as the Coastal Act is grounded in equity because it represents a legislative declaration that acts injurious to the state's natural resources constitute a public nuisance. (*CEEED v. California Coastal Zone Conservation Com.*, 43 Cal.App.3d 306, 318, 118 Cal.Rptr. 315 (1974); *see also Leslie Salt Co. v. San Francisco Bay Conservation etc., Com.*, 153 Cal.App.3d 605, 618, 200 Cal.Rptr. 575 (1984).)

In sum, the Court of Appeal applied well-settled factors and legal principles in finding that the Coastal Act fines were proportional to Petitioners' numerous and intentional violations of state law.

II.

THE COASTAL ACT REMEDIES ARE NOT CRIMINAL IN NATURE

Petitioners wrongly rely on the civil forfeiture line of cases to argue that the fines imposed in this case are unconstitutional. (Pet. at pp. 12-13.) That body of case law arises "under the Double Jeopardy Clause [where] a

defendant who already had been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." (*United States v. Halper*, 490 U.S. 435, 448-449 (1989).)

Here, the Coastal Commission sued Petitioners only once, seeking injunctive relief and civil fines under the remedial provisions of the Coastal Act. Thus, the civil forfeiture cases are inapplicable because they involve prior criminal convictions as the basis for the forfeiture. No prior criminal convictions are present in the instant case. Thus, the Court of Appeal correctly rejected Petitioners' forfeiture analysis:

> "Since the injunctive relief was intended to protect the public's interest in California's coastal areas, the remedy was civil in nature. Consequently, Ojavan Investors' forfeiture theory does not apply. In view of the record, the trial court properly exercised its discretion in ordering Bogart to rescind the sales to third parties." (Pet., App. A at p. 35a.)

Furthermore, the fines, once paid, must be used to "carry[ ] out the provisions" of the Coastal Act and, for that reason, "shall be deposited in the Violation Remediation Account of the Coastal Conservancy Fund until appropriated." (Pub. Resources Code § 30823.) Thus, the fines are remedial and not punitive.

Accordingly, the Court of Appeal properly rejected Petitioners' attempts to paint the Coastal Act's remedial provisions as criminal in nature because they are designed and intended to protect the public's interest in

the state's coast, obtain compliance with the Act and remediate environmental degradation within the coastal zone.

III.

THERE IS NO RIGHT TO A TRIAL BY JURY BECAUSE COASTAL ACT ENFORCEMENT IS PURELY EQUITABLE

Subsequent to the liability determination, the trial court granted the Coastal Commission's motion in limine to strike Petitioners' jury demand "because the only remaining issues are those raised in the Coastal Commission's cross-complaint brought pursuant to the California Coastal Act of 1976, Public Resources Code § 30000 *et seq.*, and such claims are equitable in nature." (CT 3873.) Petitioners argued on appeal that the trial court abused its discretion in issuing this order because the "gist" of a Coastal Act enforcement action is "damages" and that, therefore, Petitioners were entitled to a jury trial on the amount of fines to be imposed. (Pet. at pp. 18-22.) The state court disagreed and affirmed the order in the unpublished portion of the opinion. (Pet., App. A at p. 30a.) The court held that "there is no right to a jury trial in an action sounding in equity [and] [w]here, as here, the civil fines are tied to the injunction in that the same alleged misconduct is the basis for all the types of relief sought, the issues are equitable in nature." (*Ibid.* citing *C & K Engineering Contractors v. Amber Steel Co.*, 23 Cal.3d 1, 9, 151 Cal.Rptr. 323 (1978), and *People v. Witzerman*, 29 Cal.App.3d 169, 176-177, 105 Cal.Rptr. 284 (1972).)

Relying on the federal Clean Water Act decision of *Tull v. United States*, 481 U.S. 412 (1987), Petitioners argue that the Seventh Amendment to the U.S. Constitution guaranteed them a right to a jury trial on the fines issue. (Pet. at pp. 20-22.) In fact, the *Tull* decision held precisely the opposite:

> "In this case, highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kinds of calculations traditionally performed by judges. [Citations.] We therefore hold that a determination of a civil penalty is not an essential function of a jury trial, and that the Seventh Amendment does not require a jury trial for that purpose in a civil action." (*Tull v. United States, supra*, 481 U.S. at 427.)

Petitioners' confusion over the *Tull* decision apparently springs from this Court's other holding in the same decision concerning the right to jury on the *liability* issue. This Court held that based on explicit legislative history unique to the Clean Water Act, a violator was entitled to a jury trial on the issue of liability because the Clean Water Act's "authorization of punishment to further retribution and deterrence clearly evidences that [the penalty provision] reflects more than a concern to provide equitable relief." (*Id.* at 423.) Because liability in the instant case was established by a motion for summary adjudication, and because Petitioners did not and cannot point to anything in the Coastal Act's legislative history that in any way resembles that examined in *Tull*, this holding has no application here.

In any event, the Seventh Amendment jury trial guarantee has *not* been incorporated in the Due Process Clause of the Fourteenth Amendment and, therefore, is not binding on the states. (*Palko v. Connecticut*, 302 U.S. 319, 324 (1937), overruled on other grounds in *Benton v. Maryland*, 395 U.S. 784 (1969).) Thus, with respect to the Seventh Amendment, the "States . . . are left to regulate trials in their own courts in their own way." (*Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1875).) This Court continued:

> "A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. [Citation.] Due Process is process due according to the law of the land." (*Walker v. Sauvinet, supra*, 92 U.S. at 93.)

In civil actions brought in California, the "defendant has no right to a jury trial under the Seventh Amendment." (*County of El Dorado v. Schneider*, 191 Cal.App.3d 1263, 1272, 237 Cal.Rptr. 51 (1987).) It is also settled in California that contemporary environmental legislation such as the Coastal Act is grounded in equity because it represents a legislative declaration that acts injurious to the state's natural resources constitute a public nuisance. (*CEEED v. California Coastal Zone Conservation Com., supra*,

43 Cal.App.3d at 318; *see also Leslie Salt Co. v. San Francisco Bay Conservation etc., Com., supra,* 153 Cal.App.3d at 618.) And, as the state court ruled here, there is no right to a jury trial in an action sounding in equity. (*C & K Engineering Contractors v. Amber Steel Co., supra,* 23 Cal.3d at 9.)

Even the other non-environmental and non-equitable case law relied on by Petitioners supports the order striking their jury demand. For example, in a case cited by Petitioners at page 12 of their petition, this Court held:

> "[C]ivil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. *Neither a jury trial nor proof beyond a reasonable doubt is required."* (*International Union, United Mine Workers of America v. Bagwell,* 512 U.S. 821, 827 (1994), emphasis added.)

This analysis is applicable here because, as with civil contempt sanctions, Coastal Act civil fines are designed to coerce compliance with the permit requirements of the Act, including the terms and conditions placed on any permit. For this reason, enforcement actions under the Coastal Act are not punitive, but are actions to abate public nuisances. (*CEEED v. California Coastal Zone Conservation Com., supra,* 43 Cal.App.3d at 318; *Leslie Salt Co. v. San Francisco Bay Conservation etc., Com., supra,* 153 Cal.App.3d at 618.) Furthermore, Petitioners were and are given a chance to purge the daily fine because, as the

state court noted, it is imposed "per day for each day in which such violation occurs." (Pet., App. A at p. 16a.)

Thus, if Petitioners had agreed to rescind their illegal purchases and sales of the deed restricted lots earlier in this litigation, they could have unilaterally and dramatically limited their exposure. Indeed, as demonstrated by Petitioners' related petition writ of certiorari filed concurrently with the instant petition, even in the face of mounting daily fines and three civil contempt citations, Petitioners have steadfastly refused to comply with the unbonded and currently enforceable injunction, thus preventing reimbursement to the defrauded third party purchasers who are still holding deed restricted properties. (*Bogart v. California Coastal Com.*, Sup. Ct. Docket No. 97-622.) The related petition also shows that Petitioner Bogart is currently a fugitive from justice with a bench warrant for his arrest outstanding. (*Ibid.*) This obdurate and illegal behavior cannot be laid at the Coastal Commission's feet.

Similarly, daily fines could have been suspended by bonding the judgment pending appeal. The key to stopping fines has always been in Petitioners' hands. Petitioners, however, would rather blame the Coastal Commission for its successful enforcement of the law rather than take responsibility for their own illegal and fraudulent actions.

IV.

PETITIONERS ARE BARRED BY THE *RES JUDICATA* DOCTRINE FROM RENEWING, AT THIS LATE DATE, THEIR CHALLENGE TO THE UNDERLYING COASTAL DEVELOPMENT PERMITS

Petitioners cite the concurring opinion in *Suitum v. Tahoe Regional Planning Agency*, ___ U.S. ___, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997), for the proposition that the TDC program, similar to that used by the Coastal Commission, "was recently soundly [sic] criticized by Justices Scalia, O'Connor and Thomas. . . . " (Pet. at pp. 4-5, fn. 2.)[3] Setting aside Petitioners' characterization of the concurring opinion, Petitioners are indirectly attempting to re-open the validity of the coastal development permits. The California Court of Appeal, however, has unequivocally and *finally* rejected Petitioners' attempts to challenge the permits' TDC conditions:

> "We . . . hold that the time to challenge coastal development permits issued pursuant to the TDC Program is within the statutory 60-day period after issuance of the permits (Pub. Resources Code, § 30801), not when a party or a successor in interest elects to violate declarations of restrictions imposed pursuant to the permits, and a cease and desist order ensues." (*Ojavan I, supra*, 26 Cal.App.4th at 525.)

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[3] In their "Question Presented for Review," Petitioners assert that the Fifth Amendment is implicated in this action. (Pet. at p. i.) Petitioners, however, never brief the Fifth Amendment in the body of their petition. The Coastal Commission, therefore, can only assume that Petitioner's discussion of the *Suitum* decision constitutes their attempt to raise the Fifth Amendment.

This Court subsequently denied Petitioners' petition for writ of certiorari. (*Ojavan I, supra,* 513 U.S. 1148.) Accordingly, the state court properly rejected Petitioners' renewed attacks on the TDC conditions as barred by the *res judicata* doctrine. (Pet., App. A at p. 12a, citing *Goddard v. Security Title Ins. & Guar. Co.,* 14 Cal.2d 47, 52 (1939).)

CONCLUSION

The petition for writ of certiorari should be denied for the above reasons.

DATED: November 4, 1997.

Respectfully submitted,

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